CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 53

ROY G. HARRIS AND BENJAMIN F. J. ODELL,
PETITIONERS.

vs.

AVERY BRUNDAGE COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 19, 1938.

CERTIORARI GRANTED MAY 31, 1938.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

No. .....

IN THE MATTER OF TAX SERVICE ASSOCIATION OF ILLINOIS, ALLEGED BANKRUPT.

ROY G. HARRIS AND BENJAMIN F. J. ODELL,
Petitioners,

vs.

AVERY BRUNDAGE COMPANY, ET AL., AND DAHL-STEDMAN, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TRANSCRIPT OF RECORD

IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

No. 6355

IN THE MATTER OF TAX SERVICE ASSOCIATION OF ILLINOIS, ALLEGED BANKRUPT.

ROY G. HARRIS AND BENJAMIN F. J. ODELL,
Appellants,

vs.

AVERY BRUNDAGE COMPANY, ET AL., AND DAHL-STEDMAN, ET AL.,
Appellees.

Counsel for Appellants:
MR. KENART M. RAEN,

Counsel for Appellees:
MR. SIGMUND W. DAVID,

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

U. S. C. C. A.
FILED
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DOCKETED AUG. 11, 1937.
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PRINTED RECORD.

IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

No. 6355

IN THE MATTER OF TAX SERVICE ASSOCIATION OF ILLINOIS, ALLEGED BANKRUPT.

ROY G. HARRIS AND BENJAMIN F. J. ODELL,
Appellants,

vs.

AVERY BRUNDAGE COMPANY, ET AL., AND DAHLSTEDMAN, ET AL.,
Appellees.

Counsel for Appellants:
MR. KENART M. RAHN,

Counsel for Appellees:
MR. SIGMUND W. DAVID,

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

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1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable Philip L. Sullivan, District Judge of the United States for the Northern District of Illinois, on Twelfth and Thirteenth days of July, in the year of our Lord one thousand nine hundred and Thirty-Seven, being one of the days of the regular July Term of said Court, begun Monday, the Fifth day of July, and of our Independence the 162nd year. Placita.

Present:

Honorable Philip L. Sullivan, District Judge.
William H. McDonnell, U. S. Marshal.
Henry W. Freeman, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES.

Northern District of Illinois

Eastern Division.

In the Matter of
Tax Service Association of Illinois,
a corporation,
Alleged Bankrupt. } No. 65890.

Be It Remembered, that the above-entitled action was commenced by the filing of the following Petition in the above-entitled cause in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the Third day of May, A. D. 1937.

3 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—65890) • •

To the Honorable Judges of Said Court:

The petition of Commerce Clearing House, Inc., a corporation, Andersen, Witte Engraving Co., a corporation, W. L. Eckley, an individual, and National Bureau of Property Administration, Inc., a corporation, respectfully represents that the said Tax Service Association of Illinois has for the greater portion of six (6) months next preceding the date of the filing of this petition had its principal place of business and residence in the City of Chicago, County of Cook and State of Illinois, at 228 N. LaSalle St. and owes debts in the amount of One Thousand ($1000.00) Dollars and in excess thereof; that the said alleged bankrupt is engaged in the business of rendering services in connection with the levy and collection of taxes both real and personal, and is not a railroad, municipal, insurance or banking corporation, or a building and loan association, but is a moneyed business or commercial corporation within the purview of the Bankruptcy Act, and that it is now insolvent.

That your petitioner, Commerce Clearing House, Inc., has

a provable claim against the alleged Bankrupt for the sum of Thirty-four ($34.00) Dollars for books and reports sold and delivered and services rendered to the alleged Bankrupt at its special instance and request.

4 That your petitioner, Andersen, Witte Engraving Co., a corporation, has a provable claim against the said alleged Bankrupt, for the sum of One Hundred Twenty-six and 95/100 ($126.95) Dollars, for printed materials and supplies sold and delivered to the said alleged Bankrupt at its special instance and request.

That your petitioner, W. L. Eckley, has a provable claim against the said alleged Bankrupt, for the sum of Three Hundred ($300.00) Dollars, representing commissions due and owing him from the said alleged Bankrupt for sales consummated and services rendered to the said alleged Bankrupt at its special instance and request; and your petitioner, W. L. Eckley, hereby waives any claim for priority which he may or might have by virtue of the said claim as a wage claim or otherwise.

That your petitioner, National Bureau of Property Administration, Inc., a corporation, has a provable claim against the said alleged Bankrupt, for the sum of One Thousand Twenty-nine and 25/100 ($1029.25) Dollars, represented by a judgment rendered in favor of your petitioner, National Bureau of Property Administration, Inc., a corporation, against the said alleged Bankrupt on the 19th day of March, A. D. 1937, in the Circuit Court of Cook County, Illinois, Case No. 37C 1331, and which judgment remains unpaid and unsatisfied, and that your petitioner has a further provable claim against the alleged Bankrupt in the sum of Five Thousand ($5000.00) Dollars representing moneys of your petitioner which the alleged Bankrupt fails and refuses to surrender and deliver to your petitioner.

Your petitioners further represent that they have not received any preference, and that their claims, with the exception of W. L. Eckley, are not wage claims nor entitled by law to priority of payment, and as to the claim of the said W. L. Eckley, any and all priority by virtue of the said claim being a wage claim is hereby expressly waived.

5 Your petitioners further represent that the alleged Bankrupt, while insolvent and with intent to commit a

preference over its general creditors, committed an act of bankruptcy within four (4) months last past preceding the filing of this petition in that it did heretofore transfer while insolvent, a portion of its property to one or more of its creditors, with intent to prefer such creditors over its other creditors by paying out certain sums of its money to creditors, the amounts, dates and names of the creditors to whom such preferential payments were made being as follows:

$38.62 February 13, 1937 M. R. Lome & Co.
$50.00 January 4, 1937 Twentieth Century Press

said sums of money being in payment of pre-existing indebtedness.

Your petitioners further represent that within four (4) months last past prior to the filing of this petition, the said alleged Bankrupt committed a further act of bankruptcy in that it suffered or permitted, while insolvent, a creditor, to obtain through legal proceedings a judgment, and did not vacate or discharge the same within thirty (30) days from the date such judgment was obtained, that is to say on March 19th, 1937, the said alleged Bankrupt suffered a judgment to be obtained against it through legal proceedings in the Circuit Court of Cook County, Illinois, Case No. 37C 1331, in favor of National Bureau of Property Administration, Inc., a corporation, for the sum of One Thousand Twenty-nine and 25/100 ($1029.25) Dollars, upon which execution No. 157073 was issued by the Clerk of said Court on March 30, 1937, and which said judgment was and is a lien upon the personal property of the alleged Bankrupt, and which judgment is still in full force and effect unpaid and unsatisfied, and the said alleged Bankrupt has not within thirty (30) days from the date such judgment was obtained had the said judgment vacated or discharged.

6 Your petitioners further represent that the alleged Bankrupt has within four (4) months last past immediately preceding the filing of this petition conveyed, transferred, concealed or removed, or permitted to be concealed or removed, parts and portions of its property with intent to hinder, delay or defraud its creditors or any of them.

Wherefore, your petitioners pray that the services of this petition with a subpoena may be made upon the Tax Service Association of Illinois, an Illinois corporation, as provided in

the Acts of Congress relating to bankruptcy, and that it may be adjudged bankrupt within the purview of said Acts.

And your petitioners will ever pray.

Commerce Clearing House Inc.,
a corporation,
By Samuel B. Blanksten,
Its Attorneys in fact and duly authorized agent.

Andersen, Witte Engraving Co.,
a corporation,
By Samuel B. Blanksten,
Its Attorneys in fact and duly authorized agent.

W. L. Eckley,
By Samuel B. Blanksten,
His Attorneys in fact and duly authorized agent.

National Bureau of Property Administration, Inc., a corporation.
By Samuel B. Blanksten,
Its Attorneys in fact and duly authorized agent.

7 State of Illinois } ss.
County of Cook }

Samuel B. Blanksten, being first duly sworn, upon his oath deposes and says that he is the duly authorized agent of and attorney in fact for Commerce Clearing House, Inc., Andersen, Witten Engraving Co., W. L. Eckley, National Bureau of Property Administration, Inc., and has knowledge of the facts; that he has read the above and foregoing petition by him subscribed, knows the contents thereof, and that the same is true.

Samuel B. Blanksten.

Subscribed and sworn to before me this 3rd day of May, A. D. 1937.

Annetta Jacoby,
Notary Public.

(Seal)

May 18, 37. 8 And on, to wit, the 18th day of May, 1937, came the Alleged Bankrupt by its attorney and filed in the Clerk's office of said Court a certain Motion to Quash in words and figures following, to wit:

9 IN THE DISTRICT COURT OF THE UNITED STATES.

* * * (Caption—65890) * *

MOTION TO QUASH THE ALLEGED SERVICE OF PROCESS AND RETURN THEREON AND TO VACATE ALL ORDERS HERETOFORE ENTERED.

Now comes the alleged bankrupt, Tax Service Association of Illinois, a corporation not for profit, organized and existing under and by virtue of the laws of the State of Illinois, by Luis Kutner, its attorney, appearing specially for the sole purpose of this motion only, to question the jurisdiction of this Court over its person and for no other purpose, and moves the Court to quash the pretended service of notice and process upon it in this cause and the return thereon, and to vacate all orders heretofore entered, upon the grounds and for the reasons following, to-wit:

1. Said Tax Service Association of Illinois, alleged bankrupt, is a resident and citizen of the State of Illinois and is a corporation organized not for profit and not a moneyed or business corporation within the scope of the Bankruptcy Act.

2. No process in this cause or any copy of notice in this cause has ever been served upon or delivered to said alleged bankrupt personally or to any of its duly authorized agents empowered to accept process or notice, notwithstanding the return made herein by William H. McDonnell, United
10 States Marshal, by E. Glaser, Deputy on subpoena issued on May 3, 1937, for Tax Service Association of Illinois, which return is set out in the affidavit of Roy G. Harris, attached hereto and made part hereof as if incorporated.

3. That notice of intention to file petition for receiver served on May 3, 1937, at 4:25 P. M., alleges that Ralph A. Simmons was secretary "to the best information, knowledge and belief, for the Tax Service Association"; that the said service of notice and of process served upon the said Ralph A. Simmons was improper, void and of no legal effect in that

the said Ralph A. Simmons at the time of said service of notice and process upon him was not associated with the Tax Service Association of Illinois in any capacity whatsoever, nor was he held out as such.

4. That the said Ralph A. Simmons did tender his resignation as secretary of the Tax Service Association of Illinois on March 13, 1937, which resignation was accepted in accordance therewith and entered upon the minutes of the corporation by resolution of its Board of Directors on March 15, 1937.

5. That the tender of resignation of the said Ralph A. Simmons and the acceptance thereof by the Tax Service Association of Illinois was within the knowledge of the National Bureau of Property Administration and other petitioning creditors and particularly their attorneys, Blanksten & Lansing.

6. That the service of notice and process upon the said Ralph A. Simmons in the matter herein was done wilfully and with total disregard of the legal rights of the alleged bankrupt, Tax Service Association of Illinois; that the petition in bankruptcy herein filed on May 3, 1937, was done with the intention to defeat justice in that it was done in the face of the decision handed down April 30, 1937, by the Appellate Court sitting in the First District of Illinois, reversing an order
11 of February 26, 1937, entered by Superior Court Judge Walter T. Stanton, Cook County, Illinois, holding that the appointment of a receiver on February 26, 1937, in a lawsuit wherein National Bureau of Property Administration was the Plaintiff and Tax Service Association of Illinois the Defendant, was done without jurisdiction; that all the orders entered by this court subsequent to the filing of the petition in bankruptcy herein should be vacated.

7. That on May 3, 1937, subsequent to the reversal by the Appellate Court of the case herein-above mentioned, the said Tax Service Association of Illinois appeared before the said Superior Court Judge Walter T. Stanton with a petition to vacate and set aside said order of February 26, 1937, and all subsequent orders in compliance with the decision of the said Appellate Court hereinabove mentioned but the said Superior Court Judge Walter T. Stanton, being advised in open court by counsel appearing for Blanksten & Lansing that the National Bureau of Property Administration contemplated and intended to carry out the preparation and filing of a petition for rehearing of said Appellate Court decision; and being so

advised the said Judge Stanton continued the aforesaid motion and petition of the Tax Service Association of Illinois until May 11, 1937.

8. That well knowing that the Tax Service Association of Illinois on May 11, 1937, was about to apply for an order before Superior Court Judge Walter T. Stanton to comply with the mandate of the Appellate Court, First District of Illinois, one of the petitioning creditors herein, National Bureau of Property Administration, along with other creditors, caused to be filed this petition in bankruptcy and obtained an order in this United States District Court, from this Honor-
12 able Court, enjoining the Superior Court Judge Walter T. Stanton from entering any orders in the receivership matter pursuant to the decision above mentioned and pending before the said Judge Stanton.

9. That the party in interest herein, the Tax Service Association of Illinois, has not absconded or is beyond the jurisdiction of the court nor cannot it be found; and the appointment of a receiver was improper in that there was no imminent danger or loss or great damage or irreparable injury or the greatest emergency.

10. That the service of notice and process upon Ralph A. Simmons, when reduced to its essentials is a scheme by the National Bureau of Property Administration and their attorneys, Blanksten & Lansing to defeat the ends of justice and wrecks the legitimate business of the alleged bankrupt, Tax Service Association of Illinois.

11. That the said Tax Service Association of Illinois is not nor was it ever insolvent nor has it ever committed any acts of bankruptcy.

12. In support of this motion the said Tax Service Association of Illinois presents the affidavit of itself by Roy G. Harris, president, and photostatic copies of the minutes of the acceptance of the resignation of Ralph A. Simmons and the tender of resignation of Ralph A. Simmons, and the envelope in which it was contained.

Luis Kutner,
Luis Kutner,
Attorney for Tax Service Association of Illinois, Appearing specially for the sole purpose of making this motion and for only that reason.

13 AFFIDAVIT OF ROY G. HARRIS.

State of Illinois, } ss.
County of Cook. }

Roy G. Harris, having been first duly sworn on oath deposes and says:

1. That he is a citizen and resident of Villa Park, DuPage County, State of Illinois.

2. That he is and has been since the 2nd day of July, A. D. 1935, the president of the Tax Service Association of Illinois, a corporation not for profit, organized under and by virtue of the laws of the State of Illinois, on the 29th day of January, A. D. 1932.

3. That the object of the Tax Service Association of Illinois is to render a complete service to its members, which shall include the appraisal of both real and personal property for the purpose of taxation; to examine and analyze real and personal property of its members and to report the status and condition thereof; to aid in contesting of the unfair and excessive taxes assessed against any of its members; to render to its members cooperative service in the purchase of supplies, materials, etc.; and to render such other services to its members as may from time to time be desirable.

4. That he has the authority to subscribe his name as president to the above motion to quash the alleged Service of Process and return thereon and to vacate all orders heretofore entered herein, and that he hereinafter subscribes the corporation's name by himself hereinabove and hereunto for the sole purpose of objecting to the jurisdiction of this Court over the person of the Tax Service Association of Illinois.

5. That no process in this case or any copy of notice in this case, has ever been served upon or delivered to said al-
14 leged bankrupt personally, or any of its duly authorized agents empowered to accept Service of Process, nothwithstanding the return made herein by William H. McDonnell, United States Marshal, by E. Glaser, Deputy, on subpoena issued on May 3, 1937, for Tax Service Association of Illinois, which return recites as follows:

"Served this Writ on the within named Tax Service Association of Illinois, a corporation, by delivering a copy thereof Ralph A. Simmons, Secy, an agent of said corporation this

10 day of May 1937. The president of said Corporation not found in my district.

Wm. H. McDonnell,
U. S. Marshal,
By E. Glaser,
Deputy.

Marshal's Fees	
1 Service	$2.00
1 Miles	.06
Total	$2.06"

6. That he is informed that notice of intention to file petition for receiver was served May 3, 1937, at 4:25 P. M., on one Ralph A. Simmons, wherein in affidavit of service it was alleged that Simmons was secretary "to the best information, knowledge and belief of the Tax Service Association".

7. That the Tax Service Association of Illinois and one of the petitioning creditors herein, National Bureau of Property Administration, has been associated with each other; that the petitioning creditor, National Bureau of Property Administration, and its attorneys herein, Blanksten & Lansing, well knew that the said Ralph A. Simmons was no longer associated with the Tax Service Association of Illinois since March 15, 1937; that the affidavit of service alleging that Simmons was the Secretary "to the best information, knowledge and belief, of the Tax Service Association of Illinois" was wilfully untrue and designed with the obvious intent and purpose to mislead and work a fraud upon this Court pursuant to the bad faith of the National Bureau of Property Administration in its continued campaign and conduct to plunder, pillage and wreck the Tax Service Association of Illinois.

15 8. That the said Ralph A. Simmons was not at the date of service of Notice and Process herein above set forth, the proper person or agent authorized or empowered to receive Notice for and on behalf of the Tax Service Association of Illinois, that on March 13, 1937, the said Ralph A. Simmons upon whom Process was served, tendered in writing his resignation to the directors of the Tax Service Association of Illinois, in words and figures as follows:

"March 13, 1937.

To
The Directors,
Tax Service Association of Illinois,
Chicago, Illinois.

Confirming my verbal statement to Mr. George P. Clayson, and the attorney accompanying him, on Saturday, March 13, 1937, I hereby tender my resignation as a director of and secretary of Tax Service Association of Illinois, and ask that said resignation be made effective immediately.

R. A. Simmons (Signature)"

9. That pursuant to the tender of resignation by the said R. A. Simmons, a special meeting of the Board of Directors of the Tax Service Association of Illinois, was held in Room 2010—33 North La Salle Street, Chicago, Illinois, at the hour of 11 o'clock A. M., on the 15th day of March, A. D. 1937, pursuant to the written waiver of notice.

10. That at the special meeting of said Board of Directors and upon motion duly made, seconded and unanimously carried, it was resolved that the resignation of R. A. Simmons, of date of March 13, 1937, as Secretary of Tax Service Association of Illinois, be accepted and incorporated in the minutes of the meeting..

11. That attached hereto are photostatic copies of the letter of resignation of R. A. Simmons, the envelope in which said letter of resignation was tendered, and the minutes of the meeting of the Board of Directors of the Tax Service
16 Association of Illinois showing the resolution that the resignation of said R. A. Simmons be accepted; that all of said photostatic copies are made a part hereof, hereby as if incorporated.

12. That, further, your affiant avers that he first learned of the filing of a petition in bankruptcy against the Tax Service Association of Illinois on May 6th, 1937.

13. That, further, your affiant avers that he at no time was informed or advised, either directly or indirectly, by the said R. A. Simmons, of the filing of a petition in bankruptcy hereinabove set forth.

14. That, further, your affiant avers that at no time were any Notices or Processes served upon him or any of the duly authorized agents or representatives of the Tax Service Association of Illinois.

15. That, further, your affiant avers that the parties in in-

terest herein have not absconded, nor are they out of the jurisdiction of this Court, or cannot be found.

16. That this petition in bankruptcy hereinabove mentioned was not filed in good faith in that the Tax Service Association of Illinois is not bankrupt, nor did it commit any acts of bankruptcy, nor is it insolvent within the purview of the Bankruptcy Statute, and that it is now willing and able to pay upon reasonable notice the just and provable claims of any creditors.

17. That, further, your affiant avers in support of his statement that the Tax Service Association of Illinois is not insolvent or bankrupt, but that in fact it now has assets consisting of cash, furniture and equipment, and accounts receivable, aggregating the sum of Twenty-Four Thousand ($24,000.00) Dollars, and that the just debts of the Tax Service Association of Illinois do not exceed Eight Thousand ($8,000.00) Dollars.

18. That, further, your affiant avers, in support of his statement, that the petition in bankruptcy was filed in bad
17 faith, that the National Bureau of Property Administration, one of the petitioning creditors herein, has for the past several months pursued a line of conduct, malicious and fraudulent, in its nature, designed for the purpose of gaining control, wrecking, pillaging and plundering of the Tax Service Association of Illinois, and attempting to place the officers of the Tax Service Association of Illinois in bad repute; that the National Bureau of Property Administration did cause to be filed a complaint in the Superior Court of Cook County, wherein it prayed for the appointment of a receiver admittedly for the dissolution and not for the conservation of the Tax Service Association of Illinois, and that the pleadings filed therein contained scandalous and libelous statements, and that on motion to vacate the orders by the Tax Service Association of Illinois, entered on February 26, A. D. 1937, was subsequently overruled; that on March 12, A. D. 1937, the Tax Service Association of Illinois filed notice of Interlocutory Appeal in the Appellate Court of Illinois, sitting in the First District of Illinois, that notwithstanding the notice of Interlocutory Appeal filed on March 12, A. D. 1937, the receiver appointed at the request of the National Bureau of Property Administration, did, on March 13, A. D. 1937, cause an order to be entered before his Honor, Walter T. Stanton, Judge of the Superior Court of Cook County, Illinois, wherein the receiver was authorized to do certain acts,

all to the detriment of the Tax Service Association of Illinois, and in a wilful disregard of the notice of Interlocutory Appeal; that on the 30th day of April, A. D. 1937, the Appellate Court reversed the order of February 26, A. D. 1937, entered by Judge Walter T. Stanton of the Superior Court of Cook County, Illinois, and held that that Court was without jurisdiction to enter the order of February 26, A. D. 1937, appointing a receiver for the defendant Association, Tax Service Association of Illinois.

18 19. That, further, your affiant avers that on May 11, A. D. 1937, after the expiration of the period for filing of a petition for rehearing before the Appellate Court of Illinois, First District, the attorney for the Tax Service Association of Illinois, appeared before his Honor, Judge Stanton in the Superior Court of Cook County, Illinois, filing motions to vacate the above mentioned order of February 26, A. D. 1937, and all subsequent orders, in compliance with the mandate of the Appellate Court hereinabove set forth; that on the following day when orders were presented to Judge Stanton by the attorney for Tax Service Association of Illinois, for signature, the attorneys for the National Bureau of Property Administration, being the same attorneys as are present in this Court representing the petitioning, alleged creditors, appeared in Judge Stanton's Court with an injunction issued by one of the Judges of the United States District Court, Northern District, Eastern Division, on the 12th day of May, A. D. 1937, restraining the Superior Court from entering any orders for the vacating as above mentioned.

20. That in view of the foregoing, your affiant further avers, that the petition in bankruptcy filed herein and appointment of the receiver pursuant thereto was done not according to law, in bad faith, and with undeniable intent and purpose to fraudulently consummate the plan to wreck, pillage and plunder the alleged bankrupt, Tax Service Association of Illinois.

And Further Your Affiant Sayeth Not.

Roy G. Harris,
Affiant.

Subscribed and Sworn to before me this 17th day of May, A. D. 1937.

Kathryn G. Lanahan,
Notary Public.

(Seal)

19 SPECIAL MEETING OF BOARD OF DIRECTORS OF TAX SERVICE ASSOCIATION OF ILLINOIS.

A special meeting of the Board of Directors of Tax Service Association of Illinois was held in Room 2010—33 North LaSalle Street, Chicago, Illinois, at the hour of 11:00 o'clock A. M., on the 15th day of March, A. D., 1937, pursuant to the written Waiver of Notice.

Roy G. Harris called the meeting to order. There were present at said meeting the following:

Roy G. Harris
George P. Clayson
Mildred P. Voigt

being all of the directors of the corporation by reason of the resignation of Clarence J. Meyer, dated March 12, 1937, and Ralph A. Simmons, dated March 13, 1937.

Said Waiver of Notice was presented to the directors by Roy G. Harris, Chairman of the meeting, and is as follows:

20 Waiver of Notice.

Chicago, Illinois, March 15, 1937.

We, the undersigned, being all of the directors of Tax Service Association of Illinois, by reason of the resignation of Clarence J. Meyer of date March 12, 1937, and Ralph A. Simmons of date March 13, 1937, hereby waive any and all notice required by law or by the Bylaws of the corporation, to a special meeting of the Board of Directors held at Room 2010—33 North LaSalle Street, Chicago, Illinois, at the hour of 11:00 o'clock A. M., on the 15th day of March, A. D., 1937, and consent that such meeting shall be held for the purposes of accepting the resignations of Clarence J. Meyer of date March 12, 1937 as Assistant Secretary, and that of Ralph A. Simmons of date March 13, 1937, as Secretary, and to fill the vacancies caused by said resignations; and to authorize the President and Secretary of said Association to execute, in the name of the said Association, as Principal, a Cost Bond with the Globe Indemnity Company of New York, as Surety, for the amount of $250.00, for the purpose of prosecuting an appeal in Case No. 37S-1716, in the Superior Court of Cook County, entitled, National Bureau of Property Administra-

tion, Inc. *vs.* Tax Service Association of Illinois, to the Appellate Court of Illinois, for the First District, and for such other business as may properly come before such meeting.

Roy G. Harris. (Signed)
George P. Clayson (Signed)
Mildred P. Voigt.

21 Roy G. Harris presented to the meeting the resignations of Clarence J. Meyer, of date March 12, 1937, as Assistant Secretary, and that of Ralph A. Simmons, of date March 13, 1937, as Secretary of Tax Service Association of Illinois.

Upon motion duly made, seconded and unanimously carried, it was

"Resolved; That the resignations of Clarence J. Meyer, of date March 12, 1937, as Assistant Secretary, and that of Ralph A. Simmons, of date March 13, 1937, as Secretary of Tax Service Association of Illinois, be, and they are hereby accepted by the Board of Directors of this corporation, and the same be, and they are hereby incorporated in the minutes of this meeting,

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22 March 12th, 1937.

To the Board of Directors
Tax Service Association of Illinois
228 North La Salle Street
Chicago, Illinois

Dear Sirs:

I herewith tender my resignation from the office of Assistant Secretary as well as my Directorship in the Tax Service Association of Illinois, to take effect immediately.

Clarence J. Meyer (Signed)
Clarence J. Meyer.

Copies to: Roy G. Harris
George Clayson
M. P. Voigt
R. Simmons
Tax Service Association of Ill.
Harold R. Schradzki.

23 March 13, 1937.

To
The Directors,
Tax Service Association of Illinois,
Chicago, Illinois.

Confirming my verbal statement to Mr. George P. Clayson, and the attorney accompanying him, on Saturday, March 13, 1937, I hereby tender my resignation as a director of and secretary of Tax Service Association of Illinois, and ask that said resignation be made effective immediately,

R. A. Simmons, (Signed)
R. A. Simmons.

24 Room 1308
189 W. Madison Street
Chicago, Illinois.

To the Directors:
Tax Service Association of Illinois,

(To be delivered at meeting called for March 15, 1937, at 11 a. m., in Room 2010—33 North LaSalle Street, Chicago.)

25 Roy G. Harris moved that George P. Clayson be elected Secretary of the Corporation.

Whereupon, on motion duly made, seconded and unanimously carried, it was

"Resolved: That George P. Clayson be, and he is hereby elected Secretary of Tax Service Association of Illinois."

Roy G. Harris then moved that Mildred P. Voigt be elected Assistant Secretary of the corporation.

Whereupon, on motion duly made, seconded and unanimously carried, it was

"Resolved: that Mildred P. Voigt be, and she is hereby elected Assistant Secretary of the Tax Service Association of Illinois."

Roy G. Harris stated that in his judgment it was for the best interest of the corporation that a certain Cost Bond in the amount of $250.00 be executed by the corporation in the prosecution of an appeal from an order appointing a Receiver for the said corporation, entered by Judge Walter T. Stanton on February 26, 1937, and suggested that said Cost Bond be executed by himself as President of the corporation and attested by George P. Clayson as Secretary, and that in view of the fact that the Corporate Seal was in the possession of Maurice J. Walsh, the attorney for the alleged Receiver,

that the said George P. Clayson be authorized and empowered to affix a facsimile of the seal of the said Tax Service Association of Illinois to the aforesaid Cost Bond.

Whereupon, on motion duly made, seconded and unanimously carried, it was

"Resolved: That Roy G. Harris, President of the corporation, be authorized to sign a Cost Bond in the amount of $250.00, for the purpose of prosecuting an appeal in Case No. 37S-1716, in the Superior Court of Cook County, Illinois, to the Appellate Court of Illinois, for the First District, and that a facsimile of the seal of said corporation may be affixed by George P. Clayson, Secretary, and attested by him, and that the same be done forthwith."

26 There being no further business to come before the meeting, the meeting was adjourned.

Roy G. Harris,
Chairman.

Attest:

Geo. P. Clayson,
Secretary.

27 And afterwards, to wit, on the 24th day of May, A. D. 1937, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit: Entered May 24, 1937

28 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

ORDER.

This matter coming on to be heard upon the petition of petitioners, Avery Brundage Company, et al., by Sigmund W. David, attorney for petitioners, and it appearing to the court that due notice of the presentation of the petition was served upon William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, Tax Service Association of Illinois, a corporation, R. G. Harris, Benjamin F. J. Odell, E. M. Craig and National Builders Bank of Chicago; and

The Court having read the petition and being fully advised in the premises;

It Is Ordered that:

1. Leave be and the same is hereby given to petitioners to file their petition instanter.

2. William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, Tax Service Association of Illinois, a corporation, R. G. Harris, Benjamin F. J. Odell, E. M. Craig, Ruth V. Willner, P. M. Weaver, R. D. Steele and National Builders Bank of Chicago, a corporation, be made parties respondent to said petition.

3. William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, Tax Service Association of Illinois, a corporation, R. G. Harris, Benjamin F. J. Odell, E. M. Craig and the National Builders Bank of Chicago, a corporation, file their respective answers to said petition before 10:00 A. M. Thursday, May 27, 1937, and that the matter be set for hearing upon the petition and said answers before the Court at 10:00 A. M. Thursday, May 27, 1937.

Enter:

Philip L. Sullivan,
Judge.

May 24, 1937.

May 24. And on, to wit, the 24th day of May, 1937, came Avery Brundage Company, et al. by their attorneys and filed in the Clerk's office of said Court a certain Petition in words and figures following, to wit:

In the District Court of the United States.
(Caption—65890)

PETITION.

To the Honorable Judges of said Court:

Your petitioners, Avery Brundage Company, Dahl-Stedman Co., Henry Ericsson Company, The Lundoff-Bicknell Company, W. J. Lynch Company, H. A. Peters Co., Robert G. Regan Company, Rosenthal-Cornell & Co., The George Sollitt Construction Co. (formerly Ralph Sollitt & Son Contruct. Co.), J. W. Snyder Co., R. C. Wieboldt Co., Addison Heat En-

gineering Company, Adelman Heating Corp., Advance Heating & Air Conditioning Corp., also known as Advance Heating Company, Ajax Heating Co., Harry D. Allen, American Heating & Plumbing Corporation, J. F. Andler, doing business as J. F. Andler Heating Co., J. P. Baldwin Co., Barnes Heating Co., Ralph B. Barnes, David B. Bauld, doing business as David B. Bauld & Co., F. C. Black Company, William Borrman, doing busines as Beverly Heating Co., Louis
32 Brunner, doing business as Louis Brunner & Son, W. A. Bunge, P. H. Callahan, Chatham Heathing Co., Chicago Steam Heating Co., E. J. Claffey Co., Commonwealth Heating Co., Thomas Conlin Company, M. J. Corboy Co., Geo. H. Dahlquist & Co., also known as George H. Dahlquist, Davis Construction Co., Dougherty Brothers, Inc., Thos. J. Douglass & Co., Fred A. Ellis & Company, also known as Fred A. Ellis & Co., Inc., Gallaher & Speck, Wm. Gawne Company, Inc., also known as William Gawne, W. J. Gemeny Co., General Heating Corporation, Hugh F. Gillice, Glennon-Bielke Co., W. G. Glover, Inc., Robert Gordon, Inc., also known as Robert Gordon, W. B. Graves Heating Co., Hanley & Company, Hansen Brothers Engineering Company (E. N. Hansen and John N. Hansen), Harper and Barce, also known as Harper & Barce, Inc., Harrison-Spielmann Co., Heating Systems, Inc., Geo. A. Henrich Company, Arthur A. Helgert, doing business as Dearborn Heating Co., Horst Bros., also known as H. A. and C. A. Horst, Ideal Heating Company, Illinois Heating & Ventilating Company, Illinois Heating & Ventilating Company, Imperial Heating Co., Inland Heating Company, C. W. Johnson, Inc., Menua Johnson, Inc., Charles E. Jorgenson, doing business as Progressive Heating Co., Kohn Bros. Company, J. E. Kelleher, doing business as Kelleher Company (Not Inc.), H. W. Keppner, Inc., also known as H. W. Keppner, A. Kilander & Co., Wm. Klender & Co., Inc., Kroeschell Engineering Co., F. W. Lamb Company, William Lees, Inc., Elmer C. Lind, Edward H. Manz, doing business as Edw. Manz Heating Co., James H. McCauley, Inc., also known as J. H. McCauley, McDonald & Trunck Co., H. V. McKirnan, Mehring & Hanson Company, Avalon Heating Co., Inc., also known as Paul H. Miller, N. P. Miller, Nimmack Heating Co., Inc. also
33 known as C. Nimmack, F. E. Moran, Inc., R. J. Neuhaus Heating & Vent. Co., also known as H. J. Neuhaus, H. F. Newstedt and H. W. Newstedt, Northwestern Heating & Plumbing Co., J. H. Olson, Phillips, Getschow Co., William A.

Pope Company, Premier Engineering Co., Inc., L. H. Prentice Company, W. T. Reddy, S. J. Reynolds Co., Inc., Chas. A. Schiemann, Standard Piping Equipment Co., Ben Stevenson, Inc., also known as Ben Stevenson, Sunbeam Heating and Air Conditioning Company, William F. Thomsen, doing business as William Thomsen Co., Triangle Heating Co., Inc., Robert J. Tropf, Leo A. Wacholz, doing business as Wacholz Heating Co., W. J. Walsh & Co., Wendt & Crone Co., Wilbern & Fitzgerald, Wittenmeier Machinery Company, Anchor Sheet Metal Works, Louis Biegler Company, K. Hirsch & Son, C. E. Jensen & Sons, John Maier & Co., John P. Moos & Co., Inc., The Rude Company, Inc., L. N. Sohn & Co., Sykes Sheet Metal Products, Albert J. Wagner & Son, also known as Albert J. Wagner, Wagner Bros. Cornice Co., Herbert H. Davis Co., Inc., Gillispie-Dwyer Company, The Haines Company, R. B. Hayward Company, H. S. Kaiser Company, George E. Mathes, Nellish & Murray Co., Narowetz Heating & Ventilating Co., Reynolds Corporation, Standard Sheet Metal Co., Western Ventilating & Engineering Co., Kaiseraire Products Sales Co., also known as Kaiseraire Products Co., Davis Bros. Marble Co., Italian Marble Co., Henry Marble Co., Peerling Marble Company, Berry Bros., Aug. Burke Roofing Co., Jacobson Roofing Co., Inc., also known as Jacobson Roofing Co., Kafka Roofing Company, Jones & Cleary, doing business as Jones & Cleary Rfg. Co., Lincoln Roofing Co., Ralph Rackner, doing business as Ralph Rackner Roofing & Sheet Metals, South Shore Roofing Co., Inc., F. D. Renaud Roofing Company, also known as Renaud Roofing Co., F. A. Forester Roofing Co., also known as Forester Roofing Co., Knauf & Weber Roofing Co., also known as Knauf & Weber, Emil Anderson Company, Inc., also known as Emil Anderson & Co., E. L. Archibald Company, L. A. Ashbeck Co., Royal L. Brockob Construction Co., Oscar Burdlund, John W. Eder, John E. Ericsson Co., Ellington Miller Co., Warren B. Ewer Company, Charles F. Freutel Roofing Co., John Sebbardt & Son, E. C. Green Const. Co., Joseph Raigh & Sons Company, Hanson Brothers Company, Rudolph G. Heinkel, E. R. Heldmaier, Inc., Jacobson Brothers Co., also known as Jacobson Bros., Charles B. Johnson & Son, Inc., G. Kehl Sons, Krehl Construction Company, William Navor Company, Monke Schiller Co., Gerhardt F. Hoyne Company, also known as G. F. Hoyne Company, Fred Mraz & Son, Modern Roofing & Siding Co., N. E. Mueller Company, National Floor Co., Na-

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tional Power Construction Co., Poiret Construction Co., Otto Randolph, Incorporated, Sides Construction Co., E. W. Sproul Construction Company, Jacob Swanson & Sons, Inc., Mathias Tinnes, United Builders, Inc., R. D. Whitaker Company, James Wigginton, Edwin E. Young, Frank Burke & Son, S. N. Nielson, James Sheddon & Co., Acorn Wire & Iron Works,
Atlas Iron Works Corporation, Central Iron Works of
35 Chicago, Eggers Iron Company, also known as Eggers Iron Works, Enos Fire Escape Co., Federal Iron Works, Henry E. Gromp Co., Harris Preble Fire Doors, Inc., O. M. Hill Fire Door Mfg. Service, also known as Hill Fire Door Mfg. Service, Illinois Bronze & Iron Works, Chas. Johnson & Son Fire Escape Co., The Kawneer Company (Coleman Bronze Co.), also known as Kawneer Co., William F. Klemp Company, Mid-City Architectural Iron Co., New City Iron Works, F. P. Smith Wire & Iron Works, also known as R. F. Smith Wire & Iron Works, United Iron & Wire Co., Inc., also known as United Iron & Wire Works, Western Wire & Iron Works, Inc., Western Architectural Iron Co., also known as Western Architectural Iron Works, Wetzel Iron Works, R. M. Weyner Co., Woodbridge Orn. Iron Co., McNulty Bros. Co., M. Lamarche & Company, N. J. Parent Company, Alfred Carlson & Son, Bullivant Plastering Company, David J. Evans, Morgan & Porter, Harold I. Sutton, Burson Bros., Inc., also known as Burson Brothers, Howard F. Nolan, Wm. Brandenburg Co., R. H. Mathiesen, F. Westerberg & Son, Stout Plastering Co. (Charles R. Stout), Goss & Guise, William Adams & Son, Alcock Plumbing Co., William Blome, Samuel E. Brown, Chas. A. Burmeister, Kasper J. Cassnova, Maurice Casey, doing business as Casey Plumbing & Heating Co., Bernard Dentzer, Frank J. Dillenburg, John T. Dorsey & Son, Charles A. Dreier Co., George R. Dreyer, Inc., Dvorak & Gazin, Samuel Erman, George Feldkamp & Son, Charles E.
Gawne, Louis A. Goldacker, Gow and Davis, Paul Grosse,
36 William Gschwind, doing business as W. F. Gschwind & Son, Chas. D. Harris, Paul J. Hamer, Wm. P. Hodges, William H. Jones, E. B. Kaiser Co., Charles Kedl Co., Inc., Kedzie Plumbing & Heating Co., Peter King, John Kleker Plumbing Company, Ashland Plumbing & Heating Co. (J. H. Kravits), Elmer T. Larson, Frank J. Lasea, Thomas E. Litvin Plumbing Co., William D. Lucke, Chicago Plumbing & Heating Co. (Geo. H. Matthews), H. Mattull, doing business as F. E. Butts Plumbing Co., Walter E. McCarthy, Michael Mele, doing business as Mele Plumbing & Heating Service,

G. F. Mooney Co., also known as Gerald F. Mooney, Northern Plumbing & Heating Co., also known as Carl Lindblad, Emil E. Otto, N. L. Patterson, doing business as E. L. Patterson Plumbing & Construction Co., Peter N. Pinciak, Ben Pomerantz, William F. Powers, doing business as R. J. Powers & Co., A. L. Racine, also known as A. L. Racine, Inc., Max Raskin, also known as Bell Plumbing Co., Inc., H. P. Reger & Company, Roland-Sullivan Co., Herman C. Sievers, Arthur G. Siewerth, Henry Swede, Charles H. Thumm Co., Frank Tousek, Wm. S. Verity Sons, Adolph Walter, Jacob G. Weber Company, T. E. Whitchurch, M. F. Lynch & Co., and South Shore Plumbing Co., represent that:

37 1. They are now and have been for some years last past, engaged in Illinois in the several businesses of building, construction, steamfitting, plumbing, sheet metal, iron, steel, wire, ventilating, air conditioning, roofing, marble and plastering contractors, and in similar contracting businesses allied to the building trades.

2. Each of the petitioners is a member of one or more of the following Associations: Builders Association of Chicago, Chicago Master Steam Fitters' Association, Sheet Metal Contractors of Cook County, formerly called Associated Sheet Metal Employers of Chicago, Ventilating and Air Conditioning Contractors' Association, Chicago Marble Dealers' Association, Roofing Contractors' Association of Cook County, Associated Builders of Chicago, The Iron League of Chicago, Employing Plasterers' Asociation of Chicago and Plumbing Contractors' Association of Chicago.

3. In April, 1935, a certain document, called an agreement, was executed by the Tax Service Association of Illinois, alleged bankrupt herein, and by the Associations which purported to execute said agreement; and the amount thereto appearing on said agreement and purported to be signed by Benjamin F. J. Odell was signed by him. Said agreement is as follows:

38 For and in consideration of the mutual promises of each other, we and each of us this 9th day of April, 1935, hereby subscribe and pay the amount set opposite our respective names, the entire amount of our subscription, not less than Fifteen Hundred ($1,500.00) Dollars, to be used for the uses and purposes set forth in agreement attached hereto.

Name	Address	Amount
Building Construction Employers Association and affiliated associations whose signatures are attached hereto.		$1500.00

Memorandum of Agreement entered into this 9th day of April, 1935, by and between the Tax Service Association of Illinois and the respective subscribers whose names appear on the subscription page, attached hereto, and hereinafter referred to as subscribers, whereby it is agreed:

1st. The Tax Service Association of Illinois agrees to expend its efforts without delay to persuade the Department of Finance of the State of Illinois to change its present rulings concerning the application of the Illinois Retailers' Occupation Tax Act to said subscribers, and in such endeavors to work in cooperation with said subscribers and to retain on their behalf and for them, but without expense to them, attorney Benj. F. J. Odell, and on account of its costs and expenses said Tax Service Association agrees to accept the amount set opposite each subscriber's name, payable on the execution of this agreement, and in the event of a favorable ruling
39 from the Department of Finance and/or in the event of a favorable ruling after proceedings have been instituted in the State Court holding said subscribers exempt from said tax, and aditional sum equivalent to the calculated net savings to each subscriber on said tax for the two calendar months next preceding such saving, but not to exceed Fifteen Thousand ($15,000.00) Dollars. Should it became necessary to prosecute or defend an appeal to the Illinois Supreme Court, the Tax Service Association agrees to assist and aid the designated subscribers and their attorney, Benj. F. J. Odell, in such proceeding and the said subscribers agree, upon the rendering of a favorable decision by the Supreme Court, to pay the Tax Service Association the calculated net savings on said tax for the three calendar months next preceding such saving, but in no event shall total charges exceed Twenty Thousand Dollars ($20,000.00).

2nd. The subscribers agree to employ the Tax Service Association of Illinois for its services, etc., as above set forth, and to cause to be paid them therefor the respective amounts and at the time above set forth. The said subscribers further agree that such procedure will be followed as may from time to time be recommended by the Tax Service Association and Benj. F. J. Odell concerning filing of the monthly schedules required by the State of Illinois under the Occupation Tax Act, and the escrowing or depositing as may seem expedient of tax sums shown in such schedules, and to comply with such other requirements as may be from time to time advisable for

the payment of invoices from their suppliers directly or indirectly carrying the occupation tax.

3rd It is mutually agreed that no appeal will be taken to the Supreme Court following an unfavorable decision in the trial court without the approval and authority of a majority of the subscribers.

4th This agreement applies to respective certified Association members.

Witness our hands and seals the day and year first above written.

Tax Service Association of Illinois,
By (Signed) R. G. Harris (Seal)
Vice-President.
Building Construction Employers' Ass'n of Chicago, Inc.,
(Signed) Louis Narquetz,
President.
(Signed) E. M. Craig,
Secretary.

Attest:

(Signed) F. M. Voight
Secretary, Tax Service
Association of Illinois

Representing the following associations:

Builders Association of Chicago,
Chicago Master Steamfitters Ass'n (Seal)
Associated Sheet Metal Employers of Chicago
Ventilating and Air Conditioning Contractors Ass'n (Seal)
Fireproofing Contractors Ass'n of Chicago
Insulation Contractors Ass'n of Chicago (Seal)
Chicago Marble Dealers Association (Seal)
Roofing Contractors Ass'n of Cook County (Seal)

Erasures
O.K.
E. M. Craig
By HOH

I hereby consent to retention under the terms of this agreement. April 30, 1935. Benj. F. J. Odell.

41 Associated Builders of Chicago
By
William J. Keahl, (Seal)
President.
H. M. Stanton, (Seal)
Secretary.
The Iron League of Chicago (Seal)
F. E. Kahl, (Seal)
Pres.
A. C. Preble, (Seal)
Sec.
Employing Plasterers' Association of Chicago (Seal)
N. J. Peruet, (Seal)
Pres.
Percy G. Wold, (Seal)
Secty.
Plumbing Contractors Association of Chicago (Seal)
J. J. Hanley, Jr., (Seal)
Vice President.
Peter M. Hunn, (Seal)
Secretary.

42 4. At the time of, or shortly after, the execution of said agreement, some of the Associations which were named as "subscribers" thereto paid the Tax Service Association of Illinois Fifteen Hundred Dollars ($1500); and, pursuant to the terms of said agreement, the Tax Service Association of Illinois employed Benjamin F. J. Odell as attorney, and shortly thereafter, in April and May, 1935, some or all of the petitioners approved said agreement and consented to its terms, and some of the petitioners executed and sent to their respective Associations, which, in turn, delivered them to the Tax Service Association of Illinois and Odell, letters or documents reading as follows:

"I (or we) hereby approve the engagement of attorney Benjamin F. J. Odell to represent me (or us) in the proposed action of the Retailers' Occupation Tax, in accordance with the agreement entered into by me (our) Association."

5. The choice of said Benjamin F. J. Odell as the attorney to represent the petitioners in the proposed action to

have the petitioners held exempt from the imposition of the Illinois Retailers' Occupation Tax was requested by the Tax Service Association of Illinois, and petitioners are informed and believe, and upon such information and belief charge the fact to be that said Odell received part of the aforesaid Fifteen Hundred Dollars ($1500.00) paid to the Tax Service Association of Illinois, and had an agreement with said Tax Service Association of Illinois that he would receive part of the further amount to be paid to the Tax Service Association of Illinois under the terms of said agreement of April 9, 1935, in case a favorable decision exempting the contractors from said tax was obtained.

43 6. After the execution of said agreement of April 9, 1935, and at the time or shortly after the execution by some of the petitioners of the letters or documents set forth in Paragraph 4 hereof, the respective Associations of which petitioners were members, at the suggestion and request of the Tax Service Association of Illinois, said Harris and said Odell advised the petitioners to prepare returns as then required by the Illinois Retailers' Occupation Tax and the Illinois Department of Finance, together with copies of said returns, and to send said returns and copies thereof to their respective Associations or directly to the Tax Service Association of Illinois, together with checks for the amount of the taxes shown to be due on their respective returns, payable to the National Builders Bank Sales Tax Escrow Fund, and advised that said checks would be deposited in a certain account in the National Builders Bank of Chicago, said account to be known as the Sales Tax Escrow Fund. During the period from March 1, 1935, to April 1, 1937, the petitioners followed said advice and sent their tax returns, with copies thereof, and their checks payable to the National Builders Bank Sales Tax Escrow Fund for the amount of the taxes shown to be due on their respective returns, either to their respective Associations, which, in turn, turned said returns and copies thereof and said checks over to the Tax Service Association of Illinois, or directly to the Tax Service Association of Illinois.

7. After the said tax returns and copies thereof of the petitioners were received by the Tax Service Association of Illinois, said Tax Service Association of Illinois filed some of the originals of said returns with the Illinois Department of Finance, but did not file some of said original returns, and

44 kept in its possession the original returns which it did not file, together with the copies of all of said returns

delivered, as aforesaid, to the Tax Service Association of Illinois. The originals of petitions' returns which were not filed with the Illinois Department of Finance, and the copies of all of said returns, are now in the possession or control of William L. O'Connell, Jr., receiver of the Tax Service Association of Illinois, the alleged bankrupt, the Tax Service Association of Illinois, R. G. Harris and Benjamin F. J. Odell, or one or more of them. The checks of petitioners accompanying said returns were deposited by the Tax Service Association of Illinois in a certain account in the National Builders Bank of Chicago, known as the Sales Tax Escrow Fund.

8. Said Sales Tax Escrow Fund in the National Builders Bank of Chicago, so far as the National Builders Bank of Chicago is concerned, was created and controlled by a letter to said Bank signed by E. M. Craig, H. O. Harris and Benjamin F. J. Odell, the original of which letter is in the possession of said bank. Said letter is as follows:

"May 2nd, 1935

National Builders Bank of Chicago,
On the Wacker Drive at LaSalle,
Chicago, Illinois

Gentlemen:

There has been opened with you this a certain account entitled Sales Tax Escrow Fund. There will be delivered to you from time to time hereafter for deposit to the credit of said account, certain cheques for various amounts issued by sundry contractors.

You are hereby instructed that the funds from time to time on deposit in said account are not the funds of the undersigned, but are under the custody and control of the undersigned pending the outcome of proposed negotiations with the Department of Finance of the State of Illinois.

45 Withdrawals from the account are to be made only on written order of the undersigned, three of whom must act together as indicated. Each cheque must bear the signature of either: Benj. F. J. Odell, or Ruth V. Willner; and R. G. Harris, or P. M. Weaver, together with E. M. Craig, or R. D. Steele.

(Signed)
Benj. F. J. Odell,
R. G. Harris,
E. M. Craig."

9. The petitioners consented to the establishment of said so called Escrow Fund, and sent their checks to be deposited in said account, for the purpose of having on hand and available, sufficient monies to pay to the State of Illinois the respective taxes shown to be due in their respective returns, hereinabove described, if the Illinois Department of Finance and the courts decided that the petitioners were not exempt from said tax; and the petitioners consented to the establishment of said account and sent their checks to be deposited in said account, pursuant to the suggestion and request of the Tax Service Association of Illinois, said Harris and said Odell, whose relations with and connection with the petitioners were created and limited solely by the aforesaid agreement of April 9, 1935, and the said letters and documents executed by petitioners, set forth in Paragraph 4 hereof. In signing said letter to the National Builders Bank of Chicago, aforesaid, dated May 2, 1935, said Craig, Harris and Odell were acting as the agents and representatives of the petitioners, and said Craig was also acting as the representative of the Building Construction Employers' Association and the other Associations who were "subscribers" to said agreement of April 9, 1935, and said Odell and Harris were also acting as the agents and representatives of the Tax Service Association of Illinois, the other party to said agreement of April 9, 1935. All of the monies deposited by the petitioners in
46 said account in the National Builders Bank of Chicago, known as the Sales Tax Escrow Fund, were at the time of their deposit and at all times since, and are now solely the monies of petitioners, in which monies neither the Tax Service Association of Illinois, William L. O'Connell, Jr., receiver of said Tax Service Association of Illinois, R. G. Harris, Benjamin F. J. Odell or E. M. Craig, have any right or interest, but said Odell, Harris and Craig have the duty to disburse that part of the Fund deposited by petitioners in accordance with the directions and request of petitioners.

10. There was deposited in said Sales Tax Escrow Fund, and there is now in said Fund in the National Builders Bank of Chicago, Three Hundred Fourteen Thousand Eight Hundred Eighty-Five Dollars and Ninety-Five Cents ($314,885.95). Of this amount there was deposited in said Fund by the petitioners, and there is now in said Fund belonging to the petitioners, Two Hundred Ninety-Seven Thousand Five Hundred Thirty-Four Dollars ad Seventy-Nine Cents ($297,534.79), or slightly in excess thereof. The exact amount deposited

from time to time in said Fund by each of the petitioners is shown on the books and records kept by the Tax Service Association of Illinois as a part of the service it was supposed to render under said agreement of April 9, 1935. Your petitioners have been informed that the books and records of the Tax Service Association of Illinois showing the exact amount deposited by each of the petitioners from time to time in said Sales Tax Escrow Fund in the National Builders Bank of Chicago, are now in the possession and control of Benjamin F. J. Odell.

47 11. Subsequent to the execution of the agreement of April 9, 1935, the Tax Service Association of Illinois and Benjamin F. J. Odell attempted to persuade the Department of Finance of the State of Illinois to change its then rulings concerning the Illinois Retailers Occupation Tax on the petitioners and other contractors; that the efforts of the Tax Service Association of Illinois and said Odell in that regard failed to effect a change in the rulings of the Illinois Department of Finance; that subsequently, and in pursuance of said agreement of April 9, 1935, the Tax Service Association of Illinois and said Odell, on the 4th day of September, 1935, instituted a suit in the Circuit Court of Cook County, Illinois, entitled Blome, et al. *vs.* Ames, et al., No. 35C 13839, in which suit said Tax Service Association of Illinois and Odell made most of your petitioners and other contractors parties plaintiff. In said suit plaintiffs prayed for an injunction to restrain K. L. Ames as Director of Finance of the State of Illinois, and Otto Kerner, as Attorney General of the State of Illinois, from assessing and collecting an Illinois Retailers' Occupation Tax against the plaintiffs, upon the ground that the plaintiffs were exempt from payment of said tax; that on June 30, 1936, a decree was entered by said Circuit Court of Cook County, dismissing the bill of the plaintiffs in said suit for want of equity; that thereafter the Tax Service Association of Illinois and Benjamin F. J. Odell prosecuted an appeal from said decree of the Circuit Court of Cook County, in said case No. 35C 13839, to the Supreme Court of the State of Illinois; that said appeal was decided and an opinion rendered by the Supreme Court of Illinois on February 18, 1937, which opinion is reported in 365 Illinois Supreme Court Reports, 456; that the Supreme
48 Court of Illinois decided in its opinion that the plaintiffs in said case, including the petitioners, were not exempt from the payment of the Illinois Rteailers' Occupation Tax.

On April 2, 1937, pursuant to the mandate of the Supreme Court of Illinois, a final decree was entered in the Circuit Court of Cook County in said case No. 35C 13839, which said final decree provides, among other things, that the plaintiffs in said cause, and each of them, make the returns required of them by the Illinois Retailers' Occupation Tax, and pay to the Department of Finance of the State of Illinois on or before the expiration of Sixty (60) days from the entry of the decree (Sixty (60) days from April 2, 1937, or by June 1, 1937), all taxes which shall have become due from them respectively to the State of Illinois, under the provisions of said Retailers' Occupation Tax, prior to the time of the entry of said decree, and which are then due and unpaid, together with interest on the several amounts from and after the date or dates upon which said several amounts shall have become due and payable under the provisions of said Act or the then decree to the date of the payment thereof, at the rate of Three per cent (3%) per annum; and said decree further provides that if the plaintiffs shall fail and neglect to make said returns or to pay to the Department of Finance of the State of Illinois the full amount of said taxes and said interest thereon, as therein provided, within said period of Sixty (60) days from the entry of said decree, the injunction order entered in the decree restraining the Director of Finance and the Attorney General from applying or enforcing the penalty and interest provisions of said Act, shall be dis-
49 solved and shall be of no further force or effect. The penalty provided by the Illinois Retailers' Occupation Tax is Twenty-Five per cent (25%) of the amount of the tax assessed, and the interest under the Act is Five per cent (5%) per annum upon the tax assessed.

12. All relations of the Tax Service Association of Illinois and said Harris and said Odell with your petitioners, under said agreement of April 9, 1935, and the letters or documents executed by some of the petitioners, set forth in Paragraph 4 hereof, and all services rendered and to be rendered to your petitioners by said Tax Service Association of Illinois, said Harris and said Odell, terminated and were concluded upon the entry of the final decree entered on April 2, 1937, in the Circuit Court of Cook County, Illinois, in the case of Blome, et al. *vs.* Ames, et al., No. 35C 13839, pursuant to the mandate of the Supreme Court of Illinois.

13. On account of the great number of your petitioners,

and for other reasons, each of the petitioners has, by written authorization dated May 7, 1937, authorized George V. Dahl, Henry P. Reger and Louis Narowetz, Sr. as a Special Committee on Illinois Retailers' Occupation Tax, to act on his or its behalf in connection with all matters relating to or arising out of the opposing by said petitioners and other contractors and Associations of the imposition of the Illinois Retailers' Occupation Tax on contractors, and relating to or arising out of the participation by said petitioners in the case of Blome et al, *vs.* Ames, et al., Circuit Court No. 35C 13839, and each said petitioner has further specifically authorized said Committee to arrange with the Illinois Department of Finance for the payments due for said tax from said contractors, including the said petitioners who were parties to said law suit, and to make said payments; to make any compromise or adjustments with the Department of Finance in regard to such payments, which the Committee may deem advisable; to make such distribution of the Sales Tax Escrow Fund on deposit with the National Builders Bank of Chicago as the Committee shall deem to the best interests of said contractors, including the said petitioners; to incur such expenses, including attorneys' fees, as may be necessary in order to protect the interests of said Associations and said contractors and said Escrow Fund; to terminate all relations with any attorney heretofore representing the said petitioners in said law suit; and to institute or defend such law suits in behalf of said Associations and said contractors, including the said petitioners, as may be necessary or advisable in the judgment of the Committee to protect the interests of said Associations or said contractors.

14. The petitioners, acting by and through the said Special Committee on Illinois Retailers' Occupation Tax, on May 10, 1937, requested Benjamin F. J. Odell to cease from acting as attorney or representative of the petitioners, and to do nothing further on behalf of any of them; and requested and demanded said Odell to turn over to said Committee at once, all papers, documents and data, including among other things, the originals and copies of the Illinois Retailers' Occupation Tax returns of the petitioners, which said Odell has in his possession or in his control, pertaining to or connected with the Illinois Retailers' Occupation Tax, from the period from March 1, 1935, to April 1, 1937, or pertaining to or connected with the law suit of Blome, et al. *vs.* Ames, et al., Circuit Court

No. 35C 13839, and the appeal from the decree in said suit;
51 and requested and demanded that said Odell, as one of the parties on whose order withdrawal can be made from the Sales Tax Escrow Fund on deposit with the National Builders Bank of Chicago, pursuant to said letter of May 2, 1935, execute a check to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., as Special Committee on Illinois Retailers' Occupation Tax, for the amount in said Sales Tax Escrow Fund deposited therein by the petitioners, amounting to in excess of Two Hundred Ninety-Seven Thousand Five Hundred Dollars ($297,500.00), or that in lieu thereof said Odell execute a document wtihdrawing his name and that of Ruth V. Willner, as parties one of whose signatures must be on any check drawn on such Fund, to the extent of the amount in said Sales Tax Escrow Fund deposited therein by the petitioners.

Said Odell refused to turn over to the petitioners or to the said Special Committee on Illinois Retailers' Occupation Tax, designated as aforesaid by your petitioners, any of said papers, documents and data, and refused to comply with petitioners' request and demand concerning the said Sales Tax Escrow Fund.

15. The petitioners, acting by and through the said Special Committee on Illinois Retailers' Occupation Tax, on May 19, 1937, requested R. C. Harris to cease from acting for or representing any of the petitioners, and to do nothing further on behalf of any of them; and requested and demanded said Harris to turn over to said Committee at once, all papers, documents and data, including, among other things, the originals and copies of the Illinois Retailers' Occupation Tax, returns of the petitioners which said Harris has in his possession or in his control, pertaining to or connected with the Illinois Retailer's Occupation Tax, from the period from May 1, 1935, to April 1, 1937, or pertaining to or connected with the law suit of Blome, et al. *vs.* Ames, et al., Circuit Court
52 No. 35C 13839, and the appeal from the decree in said suit; and requested and demanded that said Harris, as one of the parties on whose order withdrawal can be made from the Sales Tax Escrow Fund on deposit with the National Builders Bank of Chicago, pursuant to said letter of May 2, 1935, execute a check to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., as Special Committee on Illinois Retailers' Occupation Tax, for the amount in said Sales Tax Escrow Fund deposited therein by the petitioners,

amounting to in excess of Two Hundred Ninety-Seven Thousand Five Hundred Dollars ($297,500.00), or that in lieu thereof said Harris execute a document withdrawing his name and that of P. M. Weaver, as parties one of whose signatures must be on any check drawn on such Fund, to the extent of the amount in said Sales Tax Escrow Fund deposited therein by the petitioners.

Said Harris refused to turn over to the petitioners or to the said Special Committee on Illinois Retailers' Occupation Tax, designated as aforesaid by your petitioners, any of said papers, documents and data, and refused to comply with petitioneers' request and demand concerning the said Sales Tax Escrow Fund.

16. Petitioners further represent that said E. M. Craig, who is one of the signers of said letter of May 2, 1935, addressed to the National Builders Bank of Chicago, is ready, willing and eager to comply with any request of your petitioners in regard to the disposition of the monies deposited by them in said Sales Tax Escrow Fund, and to release or disburse said monies in said Fund in accordance with the desires of your petitioners.

53 17. Said William L. O'Connell, Jr., receiver of the Tax Service Association of Illinois, has informed your petitioners that the Tax Service Association of Illinois has failed to turn over to him any of the papers, documents and data pertaining to or connected with the Illinois Retailers' Occupation Tax on the petitioners, for the period from March 1, 1935, to April 1, 1937, or pertaining to or connected with the law suit of Blome, et al. *vs.* Ames, et al., Circuit Court No. 35C 13839, and the appeal from the decree in said suit, and that he has none of said papers, documents or data in his possession. Said O'Connell has further informed your petitioners that he has made demand upon said Odell for said papers, documents and data, and that said Odell has not complied with said demand, and that he has attempted to make demand upon said Harris for said papers, documents and data.

18. Your petitioners say that the originals of the Illinois Retailers' Occupation Tax returns prepared by petitioners and delivered to the Tax Service Association of Illinois and which were not filed by the Tax Service Association of Illinois and are now in the possession or under the control of the Tax Service Association of Illinois, said Harris and said Odell, or one or more of them, and also the copies or dupli-

cates of all of the Illinois Retailers' Occupation Tax returns prepared by petitioners and delivered to the Tax Service Association of Illinois, and which are now in the possession or under the control of the Tax Service Association of Illinois, said Harris and said Odell, or one or more of them, are the property of petitioners, and none of said Tax Service Association of Illinois, Odell or Harris, nor William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois,
54 has any interest therein or right of possession thereto, and all of the same should be delivered instanter to the petitioners by delivery to the said Special Committee on Illinois Retailers' Occupation Tax, which Committee represents the petitioners and is hereby authorized by the petitioners to receive said returns and copies thereof.

The books, records and accounts of the Tax Service Association of Illinois upon which are shown all matters relating to the Sales Tax Escrow Fund and how much was deposited from month to month by each of the petitioners in said Sales Tax Escrow Fund belong to and should be delivered instanter to William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, by whomsoever has possession of the same, and should be open for inspection, examination and copying by petitioners.

19. The aforesaid Two Hundred Ninety-seven Thousand Five Hundred Thirty-four Dollars and Seventy-nine Cents ($297,534.79) deposited in the Sales Tax Escrow Fund by the petitioners is, as above set forth, the sole property of the petitioners and was deposited by them for the purpose of paying the Illinois Retailers' Occupation Tax on petitioners for the periods for which said monies were deposited. Petitioners desire to pay to the Department of Finance of the State of Illinois the Illinois Retailers' Occupation Tax which petitioners believe to be due from them for the period from March 1, 1935, to April 1, 1937, and for that purpose petitioners require at once the said Two Hundred Ninety-seven Thousand Five Hundred Thirty-four Dollars and Seventy-nine Cents ($279,534.79) or the greater part thereof. In order to make the payments for said period which they believe to be due from them, petitioners also require at once the originals of the returns pre-
55 pared by them and delivered to the Tax Service Association of Illinois and not filed with the Illinois Department of Finance, and the copies or duplicates of all of the returns prepared by them for said period and delivered to the Tax Service Association of Illinois, and petitioners also require at once an inspection of the books, records and accounts of the

Tax Service Association of Illinois showing how much was deposited by each of your petitioners from month to month in said Sales Tax Escrow Fund.

20. If petitioners fail to pay, on or before June 1, 1937, the Retailers' Occupation Taxes owing by them for the period from March 1, 1935, to April 1, 1937, (and they will so fail and will be unable to pay said taxes unless the monies of the petitioners in said Sales Tax Escrow Fund are turned over to petitioners instanter and unless the aforesaid tax returns and copies thereof of petitioners are immediately turned over to them and unless they are permitted to make said inspection of the books, records and accounts of the Tax Service Association of Illinois, as above set forth) petitioners probably will be subjected to the payment of the Retailers' Occupation Tax owing by them for said period, together with a penalty of twenty-five per cent (25%) thereof and five per cent (5%) interest per annum thereon, until paid. The petitioners are unable to pay the amount of taxes for said period which they believe to be due, except with the monies of petitioners in said Sales Tax Escrow Fund.

Petitioners further say that unless the monies of petitioners in said Sales Tax Escrow Fund are turned over to petitioners instanter, and unless said books, records, documents and data aforesaid are turned over to them instanter, and unless they are permitted at once an inspection of the books,
56 records and accounts of the Tax Service Association of Illinois showing the respective amounts deposited by each of said petitioners in said Sales Tax Escrow Fund, they will be damaged in excess of One Hundred Thousand Dollars ($100,000) and will be otherwise irreparably damaged.

Wherefore, your petitioners pray:

1. That this Court order William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, Tax Service Association of Illinois, a corporation, R. G. Harris, Benjamin F. J. Odell, E. M. Craig, Ruth V. Willner, P. M. Weaver, R. D. Steele, National Builders Bank of Chicago, corporation, be made parties respondent to this petition.

2. That this Court order Benjamin F. J. Odell, R. G. Harris and E. M. Craig, and each of them, to sign instanter a joint check for Two Hundred Ninety-seven Thousand Five Hundred Thirty-four Dollars and Seventy-nine Cents ($297,534.79) payable to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illi-

nois Retailers' Occupation Tax, to be drawn on the Sales Tax Escrow Fund at the National Builders Bank of Chicago and deliver said check instanter to said Special Committee or any member thereof or to Sigmund W. David, attorney for petitioners; and that the National Builders Bank of Chicago honor and pay said check out of said Sales Tax Escrow Fund upon endorsement thereof by said George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, and presentation of said check for payment; that the Court further order that, if Benjamin F. J. Odell does not sign said check instanter, Ruth V. Willner sign the same, and that, if R. O. Harris does not sign said check instanter, P. M. Weaver sign the same.

57 That the Court further order that, if said check so executed is not delivered to the persons or person named above within the time specified by the Court, a check for said amount to said payees and drawn on said fund in said bank shall be signed by any one or more of said Benjamin P. J. Odell, R. O. Harris and E. M. Craig and delivered to the persons or person named above, and said National Builders Bank of Chicago shall honor and pay said check out of said Sales Tax Escrow Fund upon endorsement thereof by said George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, and presentation of same for payment, the same as if said check were signed jointly by all three of said Benjamin F. J. Odell, R. G. Harris and E. M. Craig.

3. That the Court order that William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, the Tax Service Association of Illinois, R. G. Harris and Benjamin F. J. Odell, their respective agents, employees and representatives, turn over and deliver instanter to petitioners by turning over and delivering to George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, or to any member of said Committee or to Sigmund W. David, attorney for petitioners, all papers, documents and data pertaining to or connected with the Illinois Retailers' Occupation Tax

58 on petitioners, or any of them, for the period from March 1, 1935, to April 1, 1937, or pertaining to or connected with the participation of the petitioners, or any of them, in the law-suit of Blome, et al. *vs.* Ames, et al., Circuit Court of Cook County No. 35C 13839, and the appeal from the de-

cree in said suit, including the originals and copies of the Illinois Retailers' Occupation Tax returns of the petitioners for said period from March 1, 1935, to April 1, 1937, which they have in their possession or under their control.

4. That the Court order that the Tax Service Association of Illinois, R. G. Harris and Benjamin F. J. Odell turn over and deliver instanter to William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, all books, records and accounts of the Tax Service Association of Illinois showing or pertaining to the amounts paid from time to time by the petitioners, and any of them, into the Sales Tax Escrow Fund at the National Builders Bank of Chicago, and that upon receipt of said books, records and accounts the Receiver permit petitioners, by said Special Committee on Illinois Retailers' Occupation Tax or by Sigmund W. David, attorney for petitioners, or by the duly authorized agent of said Committee or said attorney, to inspect, examine and copy all or any part of said books, records, documents and accounts.

5. That the Court grant such further relief to the petitioners as may be necessary in the premises.

59 George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., as Special Committee, are hereby designated as the agents and representatives of the petitioners, and each of them, for any or all purposes relating to or connected with the matters set forth in this petition, and said Committee has been given the power and authority of the petitioners, and each of them, as heretofore set forth.

Avery Brundage Company and the other individuals, partnerships and corporations whose names are set forth as petitioners in the beginning of this petition,

Petitioners,

By Geo. H. Dahl,
Henry P. Reger,
Louis Narowetz,
Special Committee on Illinois Retailers' Occupation Tax authorized to act for and sign this petition on behalf of all of the petitioners whose names are set forth in the beginning of this petition.

Sigmund W. David,
Attorney for Petitioners.

60 State of Illinois, } ss.
County of Cook. }

George V. Dahl, being first duly sworn, on oath deposes and says that he is the President of Dahl-Stedman Co., one of the petitioners hereinabove named, and that he is the George V. Dahl who, together with Henry P. Reger and Louis Narowetz, Sr., has been designated by the petitioners as the Special Committee on Illinois Retailers' Occupation Tax and authorized to act on behalf of petitioners; that he is one of the duly authorized agents and representatives of all of the petitioners in this behalf, and makes this affidavit on behalf of all of said petitioners. Affiant further says that he has read the above petition and knows the contents thereof; that the matters and things therein stated are true to the best of his knowledge and belief, except those matters and things which are stated to be upon information and belief, and those matters and things affiant believes to be true.

Further affiant sayeth not.

Geo. V. Dahl.

Subscribed and sworn to before me this 21st day of May, A. D. 1937.

James J. Glassner,
(Seal) *Notary Public.*

d May 26, 937. 61 And on, to wit, the 26th day of May, 1937, came the Petitioning Creditors by their attorneys and filed in the Clerk's office of said Court a certain Answer in words and figures following, to wit:

62 In the District Court of the United States.
* * (Caption—65890) * *

ANSWER OF THE PETITIONING CREDITORS TO PETITION OF AVERY BRUNDAGE COMPANY, ET AL.

The petitioning creditors, Commerce Clearing House, Inc., a corporation, Andersen, Witte Engraving Co., a corporation, W. L. Eckley, an individual, and National Bureau of Property Administration, Inc., a corporation, answering the petition of Avery Brundage Company, et al. state that they

neither admit nor deny each and all of the allegations in the said petition contained, and demand strict proof thereof.

Commerce Clearing House, Inc., a corp.,
Anderson, Witte Engraving Co., a corp.,
W. L. Eckley, an individual,
National Bureau of Property Administration, Inc., a corporation,
By Blanksten & Lansing,
Their Attorneys.

63 And afterwards, to wit, on the 27th day of May, A. D. 1937, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit: Entered M 27, 193

64 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

ORDER.

This matter coming on to be heard upon the petition of petitioners, Avery Brundage Company, et al., by Sigmund W. David, attorney for petitioners, and the petitioners and the respondents, William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, the Tax Service Association of Illinois, a corporation, Benjamin F. J. Odell, R. G. Harris, E. M. Craig and National Builders Bank of Chicago having appeared in open court upon the motion of petitioners, either in person or by their respective attorneys, and said petitioners and said respondents having in open court agreed that this court has jurisdiction to enter this order, and said petitioners and said respondents having agreed upon and consented to the entry of this order, and it appearing that:

In the certain account known as the Sales Tax Escrow Fund in the National Builders Bank of Chicago there is
65 now on deposit the sum of Three Hundred Fourteen Thousand Eight Hundred Eighty-five Dollars and Ninety-six Cents ($314,885.96), as alleged in the petition of petitioners; that the greater portion of said Sales Tax Escrow Fund is the proceeds of checks of the petitioners which were deposited in said Sales Tax Escrow Fund; that the amount thereof claimed by petitioners to be the proceeds of their checks, so deposited, being Two Hundred Ninety-seven Thousand Five Hundred Thirty-four Dollars and Seventy-nine

Cents ($297,534.79); and that the amount in said Sales Tax Escrow Fund not representing the proceeds of petitioners' checks represents the proceeds of checks of other contractors, which other contractors are represented by Benjamin F. J. Odell, and on their behalf consents to the entry of this order;

It Is Hereby Ordered, Adjudged and Decreed:

1. That there be paid instanter out of said Sales Tax Escrow Fund in the National Builders Bank of Chicago to the Department of Finance of the State of Illinois, to apply on account of principal and interest owing by the petitioners and the said other contractors for their respective Illinois Retailers' Occupation Taxes for the period from March 1, 1935, to April 1, 1937, seventy-five per cent (75%) of the proceeds of checks of each said petitioner and each said other contractor deposited in said fund, which said seventy-five per cent (75%) aggregates Two Hundred Thirty-six Thousand One Hundred Sixty-four Dollars and Forty-six Cents ($236,164.46), plus an amount approximating interest on seventy-five per cent (75%) of the proceeds of checks of each
66 said petitioner and each said other contractor deposited in said fund from time to time, at the rate of three per cent (3%) per annum to this date, which said interest approximates Six Thousand Thirty-five Dollars and Fifty-four Cents ($6,035.54); and that, therefore, there be paid instanter to the Department of Finance of the State of Illinois out of said Sales Tax Escrow Fund in said bank a total of Two Hundred Forty-two Thousand Two Hundred Dollars ($242,200).

2. That Benjamin F. J. Odell, R. G. Harris and E. M. Craig sign instanter a joint check for Two Hundred Forty-two Thousand Two Hundred Dollars ($242,200) payable to the order of the Department of Finance of the State of Illinois, drawn on the Sales Tax Escrow Fund in the National Builders Bank of Chicago, signed as follows: "Sales Tax Escrow Fund, by Benjamin F. J. Odell, R. G. Harris and E. M. Craig", and deliver said check instanter to the Department of Finance of the State of Illinois for the aforesaid purposes, and that the National Builders Bank of Chicago honor and pay said check out of the account known as the Sales Tax Escrow Fund in the National Builders Bank of Chicago, upon endorsement of said check and upon presentation of said check for payment.

3. That within five (5) days the petitioners furnish to the above named respondents an itemized statement showing the amount that each of said petitioners claims to have deposited

in said Sales Tax Escrow Fund, and that said list and the amounts thereof be examined and checked by Benjamin F. J. Odell, and that he report the result thereof to Sigmund W. David, attorney for petitioners, and that if there be any differences between the figures furnished by the petitioners and the figures in the hands of Benjamin F. J. Odell, said differences be determined by this court.

67 4. That the balance of the money in said Sales Tax Escrow Fund in the National Builders Bank of Chicago, amounting to Seventy-two Thousand Six Hundred Eighty-five Dollars and Ninety-six Cents ($72,685.96) shall remain and be held in said Escrow Fund in the National Builders Bank of Chicago, subject to the further order of this court.

5. That the time for William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, R. G. Harris and Benjamin F. J. Odell to file their answers or other pleadings to said petition, is hereby extended to and including June 3, 1937, and all claims and rights in and to said balance of Seventy-two Thousand Six Hundred Eighty-five Dollars and Ninety-six Cents ($72,685.96) in said Sales Tax Escrow Fund in said National Builders Bank of Chicago, are hereby referred to Referee Wm. F. Sullivan, upon the petition of petitioners and the answers and other pleadings filed and hereafter filed thereto.

Enter:

Philip L. Sullivan,
Judge.

May 27, 1937.
Approved:
Sigmund W. David,
Attys. for Petitioners.
E. M. Craig,
William J. Flaherty,
Atty. for Wm. L. O'Connell, Jr. as Rec., etc.
Luis Kutner,
for Tax Service Association of Illinois.
R. G. Harris,
Benjamin F. J. Odell,
National Builders Bank of Chicago,
by Louis A. Bowman,
Ass't. Cashier.
Blanksten & Lansing,
Attys. for Petitioning Creditors.

ed May 1937.

68 And afterwards, to wit, on the 27th day of May, A. D. 1937, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

69 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

Thursday, May 27, A. D. 1937.

Present: Honorable Philip L. Sullivan, District Judge.

It Is Ordered by the Court that the Order heretofore entered herein May 18, 1937 referring this cause to Referee Streeter be and the same is hereby vacated and set aside and It Is Further Ordered that this cause be and the same is hereby referred to Referee William L. Sullivan.

May 26, 37.

151 And on, to wit, the 26th day of May, 1937, came the Petitioning Creditors by their attorneys and filed in the Referee's office of said Court a certain Motion in words and figures following, to wit:

152 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

MOTION OF THE PETITIONING CREDITORS TO STRIKE SPECIAL APPEARANCE AND DISMISS ALLEGED BANKRUPT'S MOTION.

Now come Commerce Clearing House, Inc., a corporation, Andersen, Witte Engraving Co., a corporation, W. L. Eckley, an individual, and National Bureau of Property Administration, Inc., a corporation, petitioning creditors in the above entitled matter, by Blanksten & Lansing, their attorneys, and respectfully move the Court to strike from the files the purported special appearance of the alleged bankrupt, Tax Service Association of Illinois, a corporation, and for an order directing the said purported special appearance and motion and affidavit in support thereof to stand as the general ap-

pearance of the said alleged bankrupt in this matter, and for a further order dismissing the Motions of the said alleged bankrupt To Quash Service and Vacate all Orders heretofore entered herein, and as grounds for this motion the petitioning creditors set forth the following:

1. The purported special appearance of the alleged bankrupt constitutes in law and in fact a general appearance of the said alleged bankrupt although containing purported words of reservation.

2. The alleged bankrupt has appeared generally in this cause and has waived all matters or objections with reference to jurisdictions of the Court in that by its purported spe-
153 cial appearance, Motion to Quash and Vacate Orders and affidavit in support thereof, it has pleaded to the merits of the Petition in Bankruptcy heretofore filed in this matter in the following respects:

(a) In the alleged bankrupt's Motion to Quash and to Vacate Orders, the said alleged bankrupt pleads to the Petition in Bankruptcy by answering and denying material allegations therein and joining issue thereon when, in Paragraph one (1) of its said purported Motion, it denies that it is a corporation within the scope of the Bankruptcy Act, and states as follows:

"Said Tax Service Association of Illinois, alleged bankrupt, is a resident and citizen of the State of Illinois and is a corporation organized not for profit and not a monied or business corporation within the scope of the Bankruptcy Act."

(b) The alleged bankrupt further joins issue and pleads to the Petition in Bankruptcy when, in Paragraph eleven (11) of its purported Motion, it denies insolvency and denies the acts of bankruptcy charged against it in the Petition in Bankruptcy in the following manner:

"That the said Tax Service Association of Illinois is not, nor was it ever insolvent, nor has it ever committed any acts of Bankruptcy."

3. The alleged bankrupt has waived any and all objections and questions of jurisdiction and has generally appeared by reason of the further fact that in the affidavit of its President, Roy G. Harris, attached to and made an integral part and portion of its purported Motion to Quash and Vacate Orders, it has pleaded generally to the merits of the Petition in Bankruptcy traversing the allegations of insolvency and the
154 Acts of Bankruptcy charged in the following manner, to wit:

(a) In said affidavit, at Page four (4) thereof, in Paragraph sixteen (16), the President of the said alleged bankrupt (who, incidentally, states in Paragraph four (4) of said affidavit, that he subscribes the corporation's name by himself for the purpose of objecting to the jurisdiction of this Court), pleads generally to the merits of the petition by denying the material allegations thereof in the following manner:

"That this Petition in Bankruptcy hereinabove mentioned was not filed in good faith in that the Tax Service Association of Illinois is not bankrupt, nor did it commit any acts of bankruptcy, nor is it insolvent within the purview of the Bankruptcy Statute * * *."

(b) Further, on Page four (4) in Paragraph seventeen (17) thereof, the alleged bankrupt by and through its President, further denies insolvency and joins issue with the original Petition in Bankruptcy in the following manner:

"That further your affiant avers in support of his statement, that the Tax Service Association of Illinois is not insolvent or bankrupt, but that in fact it now has assets consisting of cash, furniture and equipment, and accounts receivable, aggregating the sum of Twenty-four Thousand ($24,000.00) Dollars, and that the just debts of the Tax Service Association of Illinois do not exceed Eight Thousand ($8,000.00) Dollars."

4. The said purported Motion to Quash and affidavit in support thereof contain various and sundry scandalous, impertinent and redundant statements and allegations which further serve to join issue in the merits of this cause, and to vitiate any purported attempt on the part of the alleged bankrupt to appear specially for the purpose of urging jurisdictional objections.

155 5. The purported special appearance, Motion to Quash and Vacate and affidavit in support thereof constitute a general appearance of the alleged bankrupt, and a waiver of any and all jurisdictional objections for other good and sufficient reasons appearing upon the face of the said purported special appearance, Motion to Quash and Vacate and affidavit in support thereof.

The petitioning creditors, therefore, respectfully move the Court to enter the following findings and orders with respect to the alleged bankrupt's purported special appearance, Motion to Quash and Vacate Orders and affidavit in support thereof, to-wit:

1. Finding that the purported special appearance, Motion

to Quash and Vacate Orders and affidavit in support thereof of the alleged bankrupt constitute a general appearance of the alleged bankrupt in this cause.

2. An order striking from the files the purported special appearance of the alleged bankrupt and declaring the said alleged bankrupt to have appeared generally in this cause.

3. A finding that the alleged bankrupt has, in and by its purported special appearance, Motion to Quash and Vacate Orders and affidavit in support thereof, failed to confine itself to an objection or objections to jurisdiction, but has in addition pleaded generally to the merits of the original Petition in Bankruptcy traversing the allegations of insolvency and the acts of bankruptcy charged, and hence notwithstanding any reservation which the said alleged bankrupt may have attempted to make, has waived all special or personal privileges in respect to the jurisdiction of this Court, and any and all other jurisdictional objections or matters.

4. That the said alleged bankrupt has, in and by its general appearance aforesaid, waived the following jurisdictional objections, to-wit:

156 (a) The purported objection that service of notice of the application by the petitioning creditors for the appointment of a Receiver was not had upon a proper officer or duly authorized agent of the alleged bankrupt such as would charge the said alleged bankrupt with notice thereof.

(b) The purported objection that service of the subpoena under the original Petition in Bankruptcy in this cause was not had upon a proper officer or duly authorized agent of the alleged bankrupt such as would charge the alleged bankrupt with due and proper notice.

(c) The purported objection that this Court does not have jurisdiction of the alleged bankrupt for the reason that it is a not for profit corporation and not a monied or business corporation within the scope of the Bankruptcy Act.

(d) All other purported objections touching the jurisdiction of the Court in this matter.

And that this Court may enter such other and further findings and orders as are appropriate and necessary in the premises.

Commerce Clearing House, Inc., a corporation,
Andersen, Witte Engraving Co., a corporation,
W. L. Eckley, an individual,
National Bureau of Property Administration, Inc., a corporation,

By Blanksten & Lansing,
Their Attorneys.

157 State of Illinois } ss.
County of Cook }

Harold S. Lansing, being first duly sworn, upon his oath deposes and says that he is associated with the law firm of Blanksten & Lansing, the attorneys for the petitioning creditors in the above entitled matter; that he has conducted a thorough and exhaustive search of the law and authorities applicable to the questions involved, and is of the opinion that the above and foregoing motion to strike and dismiss is well-founded in law.

Affiant further states that this motion to strike and dismiss is not interposed for delay or any other dilatory purpose.

Further this affiant sayeth not.

Harold S. Lansing.

Subscribed and sworn to before me this 27th day of May, A. D. 1937.

S. G. Lippman,
Notary Public.

(Seal)

May 27, 158 And on to wit, the 27th day of May, 1937, came the National Builders Bank of Chicago and filed in the Clerk's office of said Court a certain Answer in words and figures following, to wit:

159 In the District Court of the United States.
(Caption—65890)

ANSWER OF NATIONAL BUILDERS BANK OF CHICAGO.

National Builders Bank of Chicago, a Federal Corporation, for answer to the petition of Avery Brundage Company, et al., in the above entitled cause, states as follows:

1. It acknowledges that it has on deposit in an account designated "Sales Tax Escrow Fund" the sum of $314885.95 as alleged in said petition, subject to withdrawal only on the following conditions; "Each cheque must bear the signature of either Benjamin F. J. Odell or Ruth V. Willner, and R. G. Harris, or P. M. Weaver together with E. M. Craig or R. D. Steele."

2. It reserves the right to object to such orders, if any, as

may be entered by the Court, which would direct the payment of this fund in any other manner than is provided in the directions under which it accepted such account.

3. It disclaims any interest in the other allegations in said petition and as to all allegations involving this bank, will require strict proof.

National Builders Bank of Chicago,
By (Signed) W. G. McLaury,
President.

Attest:
Louis A. Bowman,
Assistant Cashier.

160 And on, to wit, the 27th day of May, 1937, came E. M. Craig and filed in the Clerk's office of said Court a certain Answer in words and figures following, to wit: Filed May 27, 1937.

161 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—65890) * *

ANSWER OF E. M. CRAIG TO THE PETITION OF AVERY BRUNDAGE COMPANY, ET AL., FILED MAY 24, 1937.

E. M. Craig, answering the petition of Avery Brundage Company, et al. filed herein May 24, 1937, says:

1. He admits the allegations of the petition.

2. In signing the letter to the National Builders Bank of Chicago dated May 2, 1935, this respondent was acting as the agent and representative of the petitioners and others who later deposited moneys in said Sales Tax Escrow Fund in the National Builders Bank of Chicago, and he was also acting as the agent and representative of the Building Construction Employers' Association and the other Associations who were "subscribers" to the agreement of April 9, 1935, between said Associations and the Tax Service Association of Illinois; that he was not acting at any time as the agent or representative of and had no connection with the Tax Service Association of Illinois.

3. This respondent is ready, willing and eager to com-
162 ply with any request of the petitioners in regard to the disposition of the moneys deposited by them in said Sales

Tax Escrow Fund in the National Builders Bank of Chicago and to release or disburse said moneys in said fund in accordance with the desires of the petitioners.

E. M. Craig,
Respondent.

June 3, 37. 163 And on, to wit, the 3rd day of June, 1937, came William L. O'Connell, Receiver by his attorney and filed in the Clerk's office of said Court a certain Answer in words and figures following, to wit:

164 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

ANSWER.

Now comes William L. O'Connell, Jr., as Receiver of Tax Service Association of Illinois, a corporation, Alleged Bankrupt, and for answer to the Petition of Avery Brundage, et al., says:

1. This respondent, upon information and belief, admits the allegations of Paragraph 1 of said Petition.

2. This respondent, upon information and belief, admits the allegations of Paragraph 2 of said Petition.

3. This respondent, although neither the original nor a copy of said contract has come into his possession, admits, upon information and belief, that the agreement as set forth in words and figures in Paragraph 3 of said Petition, was executed by the parties thereto.

4. This respondent, upon information and belief, ad-
165 mits the allegations of Paragraph 4 of said Petition.

5. This respondent, upon information and belief, admits that Benjamin F. J. Odell received part of said sum of One Thousand Five Hundred and no/100ths Dollars ($1,500.00), but this respondent has no knowledge sufficient to form a belief, as to whether or not said Benjamin F. J. Odell had an agreement to receive part of the further amount to be paid to the Tax Service Association of Illinois, under the terms of said agreement of April 9, 1935, and therefor neither admits nor denies the same.

6. This respondent, upon information and belief, admits the allegations of Paragraph 6 of said Petition.

7. This respondent has no knowledge sufficient to form a

belief as to whether the said Tax Service Association of Illinois, a corporation, filed some of the originals of said returns with the Illinois Department of Finance, but did not file some of said returns, and therefore neither admits nor denies the same.

This respondent denies that there are now in the possession or control of this respondent, as Receiver of Tax Service Association of Illinois, a corporation, Alleged Bankrupt, or otherwise, the originals of petitioners' returns which it is alleged, were not filed with the Illinois Department of Finance, and the copies of all of said returns, and this respondent further denies that he has in his possession or control, as such Receiver, or otherwise, any of the originals or copies of said returns of petitioners, and which are alleged to have been transmitted to the Tax Service Association of Illinois; this respondent, upon information and belief, admits that the 166 checks accompanying said returns were deposited in a certain account in the National Builders Bank of Chicago, known as the "Sales Tax Escrow Fund."

8. This respondent, upon information and belief, admits the allegations of Paragraph 8 of said Petition.

9. This respondent has no knowledge sufficient to form a belief, as to whether or not the petitioners consented to the establishments of said so-called Sales Tax Escrow Fund, and sent their checks to be deposited in said account, for the purpose of having on hand and available, sufficient monies to pay to the State of Illinois, the respective taxes shown to be due on their respective returns hereinabove described, if the Illinois Department of Finance, and the Courts decided that the petitioners were not exempt from said tax, and therefor neither admits nor denies the same, and this respondent has no knowledge sufficient to form a belief, as to whether or not the petitioners consented to the establishment of said account, and sent their checks to be deposited in said account, pursuant to the suggestion and request of the Tax Service Association of Illinois, said Harris and said Odell, and therefor neither admits nor denies the same; this respondent denies that neither the Tax Service Association of Illinois, or William L. Connell, Jr., Receiver of said Tax Service Association of Illinois, have no right or interest in said monies on deposit in said Sales Tax Escrow Fund, and denies that said Odell, Harris and Craig, have the duty to disburse that part of the fund alleged to have been deposited by the petitioners

in accordance with the directions and request of peti-
167 tioners.

This respondent, further answering Paragraph 9 of said Petition, upon information and belief says that divers members of the associations, who are parties to said agreement of April 9, 1935, forwarded to the Tax Service Association of Illinois, their checks payable to the National Builders Bank of Chicago; that said checks so received by said Tax Service Association of Illinois were deposited in said Escrow Fund, not only for the purpose of having on hand and available, sufficient monies to pay to the State of Illinois the respective taxes shown to be due on the respective returns which accompanied said checks, if the Illinois Department of Finance and the Courts decided that the petitioners were not exempt from said tax, but also for the purpose of assuring the payment to Tax Service Association of Illinois of such amount as may be due it under the terms of said agreement of April 9, 1935, in the event of a favorable decision, either by the Department of Finance of the State of Illinois, the lower Court, or the Supreme Court of the State of Illinois, and that by reason of the filing of the petition herein by petitioners, that portion of said fund now on deposit with the National Builders Bank of Chicago, in said Sales Tax Escrow Fund, which was furnished by petitioners, is subject to the jurisdiction and order of this Court.

10. This respondent, upon information and belief, admits there was deposited in said Sales Tax Escrow Fund, and that there is now in said fund in the National Builders Bank of Chicago, the sum of Three Hundred Fourteen Thousand, Eight Hundred Eighty-Five and 95/100ths Dollars ($314,-168 885.95); this respondent has not sufficient knowledge to form a belief as to how much of this amount was deposited in said fund, on behalf of, or by petitioners, or whether there is now in said fund, belonging to said petitioners, Two Hundred Ninety-Seven Thousand, Five Hundred Thirty-Four and 79/100ths Dollars ($297,534.79), or slightly in excess thereof, or any other sum, and therefore neither admits nor denies the same; this respondent has not sufficient knowledge to form a belief as to whether or not the exact amount deposited from time to time in said fund is shown on the books and records of the Tax Service Association of Illinois, as a part of the service it was supposed to render under said agreement of April 9, 1935, as no such records have come into the possession of this respondent, and therefor, this respondent neither admits nor denies the same.

11. This respondent, upon information and belief, admits the allegations of Paragraph 11 of said Petition, and further answering said Paragraph 11, this respondent says, that while the Supreme Court of the State of Illinois, in its opinion in the case entitled, "R. S. Blome Co., et al., Appellants, *vs.* K. L. Ames, Director of Finance, et al., Appellees," reported in 365 Illinois Supreme Court Reports, 456, decided inter alia, "that building contractors furnishing supplies, are subject to the Retailers Occupation Tax Act," said Court in said opinion, also decided that said tax can not be computed on both labor and materials in building, but that the Department of Finance of the State of Illinois may compute the tax only on the price of materials furnished, and reversed the decree of the trial Court, and remanded the cause for further proceedings
169 not inconsistent with said opinion; that said opinion, in so far as it decided that the Department of Finance of the State of Illinois may compute the tax only on the price of materials furnished, was a decision favorable to the petitioners, and all other members of said contractors' associations, and effected substantial tax savings; and that said petitioners, and the other members of said contractors' associations, thereupon, under the terms and provisions of said agreement entered into under date of April 9, 1935, with the Tax Service Association of Illinois, became liable to pay to the said Tax Service Association of Illinois, the calculated net savings on said tax for the three calendar months next preceding such saving, total charges not to exceed the sum of Twenty Thousand and no/100ths Dollars ($20,000.00).

12. This respondent has no knowledge sufficient to form a belief, as to the allegations or conclusions of Paragraph 12 of said Petition, and therefor neither admits nor denies the same.

13. This respondent has no knowledge sufficient to form a belief, as to the allegations of Paragraph 13 of said Petition, and therefor neither admits nor denies the same.

14. This respondent has no knowledge sufficient to form a belief, as to the allegations of Paragraph 14 of said Petition, and therefor neither admits nor denies the same.

15. This respondent has no knowledge sufficient to form a belief, as to the allegations of Paragraph 15 of said Petition, and therefor neither admits nor denies the same.

16. This respondent has no knowledge sufficient to form a belief, as to the allegations of Paragraph 16 of said Peti-
170 tion, and therefor neither admits nor denies the same.

17. This respondent admits the allegations of Para-

graph 17 of said Petition, and further answering said Paragraph 17, this respondent says that he caused a demand to be made upon the said Harris, as President, and upon one George P. Clayson, as Secretary, and one Mildred P. Voight, as Assistant Secretary, of said Alleged Bankrupt, by Registered Mail, Return Receipt Requested, and that as appears from the returns in the possession of this respondent, said Harris and Voight, refused to accept said demand.

18. This respondent denies the said tax returns, as in Paragraph 18 of said Petition set forth, are the property of said petitioners, and further denies that this respondent, as Receiver aforesaid, has no interest in said returns, or the right to the possession thereof, and further denies that said petitioners are entitled to the delivery instanter, or otherwise, or said tax returns, or any part thereof.

This respondent, further answering Paragraph 18 of said Petition, admits that he, as such Receiver, is entitled to the immediate possession of all such books and records as in said Paragraph 18 set forth.

19. This respondent denies that the sum of Two Hundred Ninety-Seven Thousand, Five Hundred Thirty-Four and 79/100ths Dollars ($297,534.79), alleged to have been deposited in the said Sales Tax Escrow Fund by petitioners, is the sole property of petitioners, but this respondent says that said Tax Service Association of Illinois, has a claim to, and an 171 interest in said monies now on deposit in the said Sales Tax Escrow Fund, in an amount not to exceed the sum of Twenty Thousand and no/100ths Dollars ($20,000.00) under and by virtue of said agreement of April 9, 1935.

20. This respondent has no knowledge sufficient to form a belief, as to the allegations or conclusions of Paragraph 20 of said Petition, and therefor neither admits nor denies the same.

This respondent denies that said petitioners are entitled to the relief prayed for in Paragraphs 2 and 3 of the prayer of said Petition.

This respondent, further answering, says that under and by virtue of said agreement of April 9, 1935, and the decision of the Supreme Court of the State of Illinois hereinabove referred to, a sum not to exceed Twenty Thousand and no/100ths Dollars ($20,000.00) of said monies on deposit with said National Builders-Bank of Chicago, in said Sales Tax Escrow Fund, is due and belongs to, the Tax Service Association of Illinois.

Wherefore, this respondent prays that an order may be entered herein, restraining and enjoining the petitioners, and each of them, their attorneys and agents, the National Builders Bank of Chicago, its employees, agents, and attorneys, Benjamin F. J. Odell, R. G. Harris, Ruth V. Wilner, P. M. Weaver, E. M. Craig, and R. D. Steele, or any of them, from paying out, disbursing, or otherwise disposing of the sum of Twenty Thousand and no/100ths Dollars ($20,000.00) of said monies now on deposit with the National Builders Bank of
172 Chicago, in said Sales Tax Escrow Fund, until an adjudication of the Alleged Bankrupt is had in this proceedings, or until the further order of this Court.

William L. O'Connell, Jr.,
As Receiver of Tax Service Association of Illinois, a corporation, Alleged Bankrupt.

State of Illinois, } ss.
County of Cook. }

William L. O'Connell, Jr., being first duly sworn, deposes and says that he has read the foregoing Answer by him subscribed, knows the contents thereof, and that the same is true, except as to those matters therein averred to be upon information and belief, and as to such matters, he verily believes them to be true, and except as to such matters which affiant therein avers he has no knowledge sufficient to form a belief, and as to such matters, this affiant has no knowledge sufficient to form a belief.

William L. O'Connell, Jr.

Subscribed and Sworn to before me this 29th day of May, A. D. 1937.

John H. Clausen,
(Seal) *Notary Public.*

70 And on, to wit, the 3rd day of June, 1937, came Benjamin F. Odell and filed in the Clerk's office of said Court a certain Special Answer in words and figures following, to wit:

Filed June 8, 1937. 71 IN THE DISTRICT COURT OF THE UNITED STATES.

* * * (Caption—65890) * *

SPECIAL ANSWER OF BENJAMIN F. J. ODELL TO THE PETITION OF AVERY BRUNDAGE COMPANY, ET AL., FILED HEREIN MAY 24TH, 1937.

Now comes Benjamin F. J. Odell, appearing in his own behalf, specially and not generally, reserving any and all objections to the jurisdiction of this court over his person and the subject matter of said petition, but answering the petition on the order of this court, says:

That the petition of the said Avery Brundage Company, et al., was filed herein pending the determination of jurisdiction in the bankruptcy proceeding of the Tax Service Association of Illinois, a corporation; and that the question of this court's bankruptcy jurisdiction over the Tax Service Association of Illinois, a corporation, is now pending undetermined; that while the jurisdictional question is now before this court, the court is without jurisdiction to determine any rights relating to the petition of the said Avery Brundage Company, et al.

72 Wherefore your respondent prays that the petition heretofore filed on the 24th day of May, A. D. 1937, by Avery Brundage Company, et al., be stricken forthwith.

Benjamin F. J. Odell,
Attorney Pro Se.

State of Illinois, } ss.
County of Cook. }

Benjamin F. J. Odell, being first duly sworn, on oath deposes and says that he is the respondent herein answering in the above entitled cause, that he has read the answer by him subscribed and that the same is true in substance and in fact.

Benjamin F. J. Odell.

Subscribed and sworn to before me this 3rd day of June, A. D. 1937.

Ruth V. Willner,
Notary Public.

(Seal)

73 And on, to wit, the 3rd day of June, 1937, came Roy G. Harris by his attorney and filed in the Clerk's office of said Court a certain Petition in words and figures following, to wit: Filed June 1937.

74 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

PETITION OF ROY G. HARRIS TO STRIKE THE PETITION OF AVERY BRUNDAGE COMPANY, ET AL., FILED ON THE 24TH DAY OF MAY, A. D. 1937.

A petitioner, Roy G. Harris, by Luis Kutner, his attorney, responding specially for the sole purpose of this motion and petition, questions the jurisdiction of this court over his person, and for no other purpose, and moves the court to strike a petition of Avery Brundage Company, et al., upon the grounds and for the reasons following, to wit:

That the petition of the said Avery Brundage Company, et al., was filed herein pending the determination of jurisdiction in the bankruptcy proceeding of the Tax Service Association of Illinois, a corporation; and that the question of this courts bankruptcy jurisdiction over the Tax Service Association of Illinois, a corporation, is now pending undetermined; that while the jurisdictional question is now before this court, the court is without jurisdiction to determine any rights relating to the petition of the said Avery Brundage Company, et al.

75 Wherefore your petitioner prays that the petition heretofore filed on the 24th day of May, A. D. 1937, by Avery Brundage Company, et al., be stricken forthwith.

Roy G. Harris,
By Luis Kutner,
Luis Kutner,
His attorney, appearing specially.

State of Illinois, } ss.
County of Cook. }

Luis Kutner, being first duly sworn, on oath deposes and says that he is a citizen and resident of the City of Chicago, State of Illinois; that he is duly authorized to make the affi-

davit, and is the agent of said Roy G. Harris, and that he has read the foregoing petition and the same is true in substance and in fact.

Luis Kutner.

Subscribed and sworn to before me this 3rd day of June, A. D. 1937.

Ruth V. Willner,
Notary Public.

(Seal)

June 3. 76 And on, to wit, the 3rd day of June, 1937, came the Alleged Bankrupt by his attorney and filed in the Clerk's office of said Court a certain Petition in words and figures following, to wit:

77 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

PETITION OF TAX SERVICE ASSOCIATION OF ILLINOIS, ALLEGED BANKRUPT, TO STRIKE THE PETITION OF AVERY BRUNDAGE COMPANY, ET AL, FILED ON THE 24TH DAY OF MAY, A. D. 1937.

Now comes the alleged bankrupt, Tax Service Association of Illinois, a corporation not for profit, organized and existing under and by virtue of the laws of the State of Illinois, by Luis Kutner, its attorney, responding specially for the sole purpose of this petition to question the jurisdiction of this court over its person and for no other purpose, and to further question the jurisdiction of this court over the subject matter set forth in the petition of Avery Brundage Company, et al, heretofore filed upon the grounds and for the reasons following, to wit:

1. The said Tax Service Association of Illinois, alleged bankrupt, is a resident and citizen of the State of Illinois and is a corporation organized not for profit.

2. That on the 18th day of May, A. D. 1937, the said Tax Service Association of Illinois, did file a motion to quash service of process herein and in substance questioned
78 the jurisdiction of this court over its person and which motion is now pending undisposed of by this court.

3. That the petition of the said Avery Brundage Company, et al, was filed herein while the bankruptcy proceeding is now

pending, which is an attempt to adjudicate the Tax Service Association of Illinois, a Corporation, a Bankrupt; and that the question of this court; bankruptcy jurisdiction over the Tax Service Association of Illinois, a Corporation, is now pending undetermined; that while the jurisdictional question is now before this court, this court is without jurisdiction to determine any rights relating to the petition of the said Avery Brundage Company, et al.

Wherefore your petitioner prays that the petition of Avery Brundage Company, et al, heretofore filed, be stricken.

Tax Service Association of Illinois
By Luis Kutner,
Luis Kutner, its attorney, appearing specially.

State of Illinois }
County of Cook } ss.

Luis Kutner, being first duly sworn, on oath deposes and says that he is a citizen and resident of the City of Chicago, State of Illinois; that he is duly authorized to make the affidavit, and is the agent of said alleged bankrupt, and that he has read the foregoing petition and the same is true in substance and in fact.

Luis Kutner.

Subscribed and sworn to before me this 3rd day of June, A. D. 1937.

Ruth V. Willner,
(Seal) *Notary Public.*

173 And on, to wit, the 23rd day of June, 1937, came Referee William L. Sullivan and filed in the Clerk's office of said Court a certain Report in words and figures following, to wit:

June 28, 174 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—65890)

REPORT OF WILLIAM L. SULLIVAN, REFEREE IN BANKRUPTCY, IN THE INVOLUNTARY PETITION AND VARIOUS MOTIONS HEREIN.

To the Honorable Philip L. Sullivan, Judge of the United States District Court, For the Northern District of Illinois, Eastern Division, in Bankruptcy Sitting.

Honorable Sir:

On May 3, 1937, four creditors filed an involuntary petition in bankruptcy against Tax Service Association of Illinois, a corporation. On May 18, 1937, the alleged bankrupt corporation filed herein what it denominated as a "Motion to quash the alleged service of process and return thereon and to vacate all orders heretofore entered," supported by its affidavit signed by its president, which motion and accompanying papers I shall hereafter sometimes refer to as the alleged bankrupt's "motion to quash."

As to the latter motion to quash of the alleged bankrupt corporation, the involuntary petitioning creditors, on May 26, 1937, filed what they denominated as a motion "to strike the special appearance and dismiss alleged bankrupt's motion."

June 2, 1937 the involuntary petitioning creditors filed 175 herein a "supplement" to their motion to strike the special appearance and to dismiss alleged bankrupt's motion. To the latter so-called supplement to motion of the involuntary petitioning creditors, an answer was filed on June 7, 1937 by the alleged bankrupt corporation, praying that it (the supplement to motion of petitioning creditors) be stricken from the files.

The alleged bankrupt's motion to quash, the involuntary petitioners' motion to strike the special appearance and dismiss alleged bankrupt's motion, the petitioning creditors' "supplement" to their motion to strike and to dismiss, and the alleged bankrupt's answer thereto were referred to me.

On June 9, 1937, after due notice to all parties in interest, a hearing was held before me on the above references, which hearing was attended by the attorneys for the involuntary petitioning creditors, by the attorney for the alleged bankrupt corporation, and others. After such hearing I took the mat-

ters presented under advisement, and the petitioning creditors and the alleged bankrupt corporation have filed briefs with me, which are respectfully transmitted herewith.

The various papers, pleadings or documents filed by the parties and referred to me are of considerable length—and for that reason I will not discuss their contents herein in great detail—yet a brief statement of their subject matter is necessary to an understanding of the legal questions involved.

176 The involuntary proceedings herein in bankruptcy were commenced by creditors in statutory number and amount. The involuntary petition in bankruptcy averred, briefly, that the alleged bankrupt corporation is a corporation which may be adjudicated an involuntary bankrupt within the purview of the National Bankruptcy Act, that it is insolvent, and that it committed sundry acts of bankruptcy, enumerating them. Thereafter, the alleged bankrupt corporation filed its so-called motion to quash. Such motion sets forth that, "Now comes the alleged bankrupt, * * * appearing specially for the sole purpose of this motion only, to question the jurisdiction of this court over its person and for no other purpose, and moves the court to quash the pretended service of notice and process upon it in this cause and the return thereon, and to vacate all orders heretofore entered, upon the grounds and for the reasons following * * *."

One of the grounds and reasons set forth is that "no process in this cause has ever been served upon or delivered to said alleged bankrupt personally or to any of its duly authorized agents empowered to accept process or notice, notwithstanding the return made herein by William H. McDonnell, United States Marshal * * *." The said motion to quash then goes on to state that the service (which according to the return of the marshal was had upon the alleged bankrupt corporation by delivering a copy thereof to Ralph A. Simmons, secretary and agent of said corporation) was void because said Simmons, at the time of the service, was not associated with the alleged bankrupt corporation in any capacity whatsoever, said Simmons having resigned some months previously.

177 In said motion to quash, however, the alleged bankrupt did not limit itself to the claimed void service of process upon it, but it also set forth, among other things, that it is not a monied or business corporation within the scope of the National Bankruptcy Act, and that it is not insolvent, and that it has never committed any acts of bankruptcy. In sup-

port of such motion to quash there was presented by the alleged bankrupt its affidavit by its president and certain photostatic copies of minutes of the acceptance by the alleged bankrupt corporation of the resignation of Simmons, and the tender of such resignation.

The affidavit of the president of the alleged bankrupt corporation is along the same general lines as its motion to quash, though in somewhat more detail, and such affidavit, besides stating that the service was void and the reasons therefor, also states, among other things, that the involuntary petition was not filed in good faith, that the alleged bankrupt corporation did not commit any acts of bankruptcy nor is it insolvent within the purview of the bankruptcy statute.

Further, the motion to quash asked that the court vacate all orders "heretofore entered." The court had theretofore, on May 5, 1937, or almost two weeks before the motion to quash was filed, appointed a receiver in bankruptcy of the alleged bankrupt's property.

178 On May 26, 1937, the petitioning creditors filed a motion to strike the special appearance of the alleged bankrupt corporation and to dismiss the alleged bankrupt's motion on the grounds that the alleged bankrupt corporation, in its motion to quash and affidavit in support thereof, had pleaded to the merits of the involuntary petition in bankruptcy.

As above stated, there were also referred to me the supplement to the motion of the petitioning creditors to strike the special appearance and dismiss the alleged bankrupt's motion, as well as the alleged bankrupt's answer thereto. It is contended by the petitioning creditors in such supplement to its motion that the action of the alleged bankrupt in consenting to the order entered in the case relative to the petition filed by Avery Brundage Company, et al, concerning certain sales tax funds in escrow, and the agreement to the entry of such order by the alleged bankrupt, had the effect of admitting that the alleged bankrupt further submitted itself to the jurisdiction of the court and further waived all questions of jurisdiction.

The supplement to the motion of the petitioning creditors averred that, on May 27, 1937, a certain order was entered by the court relative to a sales tax escrow fund, more particularly set forth in the petition filed herein by Avery

179 Brundage Company, et al; that the said order entered herein on May 27, 1937 bears the signature of the alleged bankrupt by its attorneys and duly authorized agent, as well

as the signature of Roy G. Harris, its president; that said order contains, among other things, the following finding:

"This matter coming on to be heard upon the petition of petitioners, Avery Brundage Company, et al, by Sigmund W. David, attorney for petitioners, and the petitioners and the respondents, William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, the Tax Service Association of Illinois, a corporation, Benjamin F. J. Odell, R. G. Harris, E. M. Craig and National Builders Bank of Chicago having appeared in open court upon the motion of petitioners, either in person or by their respective attorneys, and said petitioners and said respondents having in open court agreed that this court has jurisdiction to enter this order, and said petitioners and said respondents having agreed upon and consented to the entry of this order, and it appearing that:

* * *"

180 Such supplement to motion of the petitioning creditors further avers that in and by the entry of the aforesaid order and agreement thereto by the said alleged bankrupt, such alleged bankrupt has further submitted itself generally to the jurisdiction of this court, and therein and thereby has further served to waive any and all questions or matters of jurisdiction.

On June 7, 1937, the alleged bankrupt filed an answer to the supplement to motion of the petitioning creditors. In its answer it denies that the entry of the order of May 27, 1937, relating to the petition filed by Avery Brundage Company, et al, constitutes a submission generally to the court's jurisdiction; denies that the entry of said order served to waive any and all questions or matters of jurisdiction; avers that the consent to the said order was obtained at the instance and suggestion of this court after the alleged bankrupt advised the court that the question of jurisdiction relating to the petition in bankruptcy was pending undetermined; avers that there was a clear understanding with the court that the entry of said order of May 27, 1937, was without prejudice to the question of jurisdiction relating to the petition in bankruptcy, and that petitioning creditors were present in court at that time by their attorneys; avers that the supplement to the motion of the petitioning crediors to strike is not made in good faith and is in direct violation of the understanding had in court; avers that the order of May 27, 1937 states, among other things, as follows:

181 "• • • and said petitioners and said respondents having in open court agreed that the court has jurisdiction to enter this order, and said petitioners and said respondents having agreed upon and consented to the entry of this order, • • •"

Attorney Sigmund W. David of the law firm of David & Fainman, which law firm had filed the so-called Avery Brundage Company, et al, petition, stated at the hearing before me that, in fairness to the attorney for the alleged bankrupt corporation, he thought he should state that it was the understanding between Attorney Flaherty (attorney for the receiver), the attorney for the alleged bankrupt corporation and himself that the so-called Avery Brundage Company, et al, order was entered subject to the then pending motions of the alleged bankrupt corporation to quash the service. He further stated that the original draft order which he drew said something about it, but it was thought unnecessary, as it was felt that the order in relation to the so-called Avery Brundage Company, et al., petition would not affect the then pending motion of the alleged bankrupt corporation on the question of service and jurisdiction.

Having in mind Your Honor's references to me herein, the alleged bankrupt corporation and the involuntary petitioning creditors seem to have somewhat lost sight of the questions presented on the references to me as special master.

182 Briefly, the questions are, whether the special appearance of the alleged bankrupt corporation should be stricken and whether the alleged bankrupt corporation's motion, to quash the alleged service of process and return thereon and to vacate all orders heretofore entered herein, had the effect of waiving any irregularity in the service of process and of conferring upon the court jurisdiction to hear the cause on its merits.

The alleged bankrupt corporation in its brief states that the "sole, exclusive and only question in this case at this time is one of law,—whether a non-profit corporation may be involuntarily adjudicated a bankrupt." It "moves" in its brief that the involuntary petition be dismissed at petitioning creditors' costs. The involuntary petitioning creditors in their brief ask that an order of adjudication be entered against the alleged bankrupt corporation. Obviously, this cause has not yet reached the stage, where either the motion of the alleged bankrupt corporation for dismissal of the involuntary peti-

tion or the request of the petitioning creditors for adjudication of the alleged bankrupt corporation is opportune.

The legal questions involved on Your Honor's references to me are not difficult of solution, notwithstanding the maze of technicalities in which they seem to be enmeshed by the various and lengthy motions. And in deciding such legal questions I do not think it necessary to consider at all
183 the alleged bankrupt corporation's consent to the already referred to Avery Brundage, et al, order.

The law seems to be clear that the court obtained prima facie jurisdiction of this proceeding as soon as the involuntary petition was filed. Upon the face of the petition the alleged bankrupt corporation appeared to be a corporation subject to involuntary bankruptcy. The involuntary petition alleged "that the said alleged bankrupt is engaged in the business of rendering services in connection with the levy and collection of taxes both real and personal, and is not a railroad, municipal, insurance or banking corporation, or a building and loan association, but is a moneyed business or commercial corporation within the purview of the Bankruptcy Act, * * *." In such situation the court had a right to preserve the property and as a means to that end to appoint a receiver. *In re De Lancey Stables Co.*, 170 Fed. 860; *In re Illinois Fireworks*, 4 Fed. Supp. 200.

If this were a case where, upon the face of the involuntary petition, it was clear that the alleged bankrupt corporation was such a corporation as could not under the law be adjudicated a bankrupt, obviously any action attempted by the court would be wholly void for no jurisdiction ever attached—the petition is coram non judice. But where, as here, there is an apparent right to file the petition, jurisdiction undoubtedly exists, that is, the right to hear, inquire and determine—although the inquiry may result in a finding that the aver-
184 ments of the petition are not true, and that for this reason the proceeding can go no further. *In re De Lancey Stables, supra.*

Another step took place in the proceedings when a couple of weeks after the involuntary petition was filed, along came the alleged bankrupt corporation and filed its special appearance and "motion to quash the alleged service of process and return thereon and to vacate all orders heretofore entered" supported by its lengthy affidavit signed by its president. In addition to such motion of the alleged bankrupt corporation alleging that the service had upon such corporation was void,

such motion also traversed the material allegations of the involuntary petition by averring that the alleged bankrupt corporation was not such a corporation as could be adjudicated an involuntary bankrupt, that the alleged bankrupt corporation is not insolvent and that it has never committed any acts of bankruptcy.

Did the alleged bankrupt's motion to quash the service of process and return thereon and to vacate all orders theretofore entered, notwithstanding it recited that the alleged bankrupt was "appearing specially for the sole purpose of this motion only, to question the jurisdiction of this court over its person and for no other purpose," have the effect of waiving the irregularity of the service and of conferring jurisdiction upon the court to inquire into the merits of the cause?

185 The rule is that the motion to quash the writ or service should go no farther than raise the special objection to the form of the writ or the irregularity of the service, because any affirmative matter raising an issue on the merits would waive the irregularity of service. (Simkin's Federal Practice, Revised Edition, page 600.) In 4 Corpus Juris, 1233, it is said that, "Broadly stated, any action on the part of a defendant except to object to the jurisdiction over his person, which recognizes the case as in court, will constitute a general appearance."

See, also, *Jones* v. *Andrews;* 10 Wall 327 (19 L. Ed. 935); *Clark* v. *Claflin,* 218 Fed. 429; *American Gasoline Corp.* v. *Commerce Trust Co.,* 29 Fed. (2d) 46; *Massachusetts Bonding & Insurance Co.* v. *Concrete Steel Bridge Co.,* 37 Fed. (2d) 695; *Feldman* v. *Connecticut General Life Insurance Co.,* 78 Fed. (2d) 838; *Edgell* v. *Felder,* 84 Fed. 69; *Sheppard* v. *Lincoln,* 184 Fed. 182; *Sanderson* v. *Bishop,* 171 Fed. 769; Nichols on Federal Procedure, Vol. 3, Section 763, at pages 426, 428, 431 (see also Section 76); *In re Cant,* 52 Fed. (2d) 223; *In re Smith,* 117 Fed. 96.

Under the situation found here, it is my opinion that the written motion to quash and the supporting affidavit of the alleged bankrupt corporation, because they contain matters of defense on the merits to the allegations of the involuntary petition, must be regarded as waiving by the alleged bankrupt corporation of the irregularity or the invalidity of

186 the service upon it and of conferring upon the court jurisdiction to hear this cause on its merits—that is, jurisdiction to hear the matters alleged on one side by the involuntary petitioners and denied on the other side by the alleged bank-

rupt corporation. Such matters are whether the alleged bankrupt corporation is a corporation which may be adjudicated a bankrupt, whether such corporation is insolvent, whether it committed acts of bankruptcy, and whether it should be adjudicated a bankrupt.

The alleged bankrupt corporation in its brief appears to recognize that the general rule is as above shown but contends it does not apply to bankruptcy proceedings. The rule has been held to apply in involuntary bankruptcy cases, some of which are above cited by me.

The alleged bankrupt corporation, having waived the irregularity of the service upon it, because of the averments to the merits contained in its so-called motion to quash and supporting affidavit, the present status of the matter is that the involuntary petition in bankruptcy is now before Your Honor on the merits; and that portion of the alleged bankrupt's motion to quash averring defenses to the allegations of the involuntary petition—that is, that the alleged bankrupt
187 corporation is not a corporation that may be adjudged a bankrupt, that the alleged bankrupt corporation is not insolvent and has never committed an act of bankruptcy—should be treated, in my opinion, as an answer to the involuntary petition. And, in my opinion, the cause should now be preceded with on the merits of the involuntary petition and the answer of the alleged bankruptcy corporation. If the alleged bankrupt corporation should wish to file an amended answer, that is, of course, a matter upon which Your Honor would have to rule.

It might be well at this point to discuss briefly some of the contentions made in the briefs filed by the alleged bankrupt corporation and the involuntary petitioning creditors.

A large portion of the brief of the alleged bankrupt corporation is taken up with assertion of the propositions that the alleged bankrupt corporation can not be adjudicated a bankrupt because it is a non-profit corporation and that "no act of anybody can confer jurisdiction where the corporation by its charter conclusively classifies it in the exempt class."

It is true that the bankrupt in its motion to quash averred that it "is a corporation organized not for profit and not a moneyed or business corporation within the scope of the bankruptcy act." On the other hand, it must be remembered that the involuntary petition in bankruptcy alleged "that the said alleged bankrupt is engaged in the business of ren-
188 dering services in connection with the levy and collection of taxes both real and personal, and is not a railroad,

municipal, insurance or banking corporation, or a building and loan association, but is a moneyed business or commercial corporation within the purview of the Bankruptcy Act * * * "

At the hearing before me the attorney for the alleged bankrupt corporation exhibited a certified copy of its charter and a certified copy of a certain bill of complaint which had been filed by one of the involuntary petitioning creditors herein against the alleged bankrupt corporation in the Superior Court of Cook County, alleging that the alleged bankrupt was a "not for profit" corporation and asking, among other things, for a receiver. Some very inconclusive discussion was also had before me but no testimony was offered.

The bankruptcy act does not prohibit a "not for profit" corporation from being adjudicated an involuntary bankrupt. What it provides is that "any moneyed, business or commercial corporation (except a municipal, railroad, insurance or banking corporation, or a building and loan association) * * * may be adjudged an involuntary bankrupt." In *Schuster* v. *Ohio Farmers' Cooperative Milk Ass'n*, (C. C. A. 6th Cir.) 61 Fed. (2d) 337, a corporation, which was a non-profit corporation by state law, was held to be subject to involuntary bankruptcy. The rule to be followed in determining whether
189 a corporation is subject to involuntary bankruptcy is that the charter and the laws of the state are to be looked to for the classification of the corporation; but where the corporation has failed to use the powers given it by its charter, or develops into a different type of corporation, then its charter will no longer be conclusive. Gilbert's Collier on Bankruptcy, 4th Edition, paragraph 215; *Matter of Prudence* (C. C. A., 2nd Cir.), 79 Fed. (2d) 77, cert. denied 296 U. S. 646.

In the case of *In re Glick*, 26 Fed. (2d) 397, our Circuit Court of Appeals held that whether the debtor is exempt from being declared an involuntary bankrupt is a question of fact to be determined in each case on its own facts and on all of the facts.

The alleged bankrupt corporation further states in its brief that, "By the very contents of the pleadings filed herein, this court must construe that the motion to quash raises questions properly raised by a motion to dismiss." That would be a strange procedure indeed, and its results could hardly be imagined in the orderly administration of the National Bankruptcy Act.

It must not be forgotten that what the bankrupt filed in

this cause was a so-called special appearance "to question the jurisdiction of this court over its person and for no other purpose," and a motion "to quash the pretended service of notice and process upon it in this cause and the return
190 thereon, and to vacate all orders heretofore entered."

The basis of its special appearance and motion to quash was that the service upon it was invalid.

There has been no "motion to dismiss" filed in this case based upon the fact that the alleged bankrupt corporation is not such a corporation as it subject to be adjudicated an involuntary bankrupt. Moreover, motions to dismiss reach only defects on the face of an involuntary petition. Obviously, there is no such defect here because the involuntary petition avers that the alleged bankrupt corporation is a corporation which may be adjudicated a bankrupt within the purview of the bankruptcy act. If the alleged bankrupt corporation claims that it is not such a corporation, that defense, in my opinion, is to be taken advantage of by answer and can not, as here, be taken advantage of by a motion to quash the service.

In Remington on Bankruptcy, Vol. 1, 4th (1934) Edition, paragraph 368, the rule is stated as follows:

"Upon a motion to dismiss controverted facts must be resolved in petitioner's favor. And a motion to dismiss raises only defects appearing on the face of the petition; and if it is desired to controvert facts alleged in the petition, an answer must be filed."

In the very latest case that I can find on the subject (*Blue Valley Creamery Company* v. *Stone*, 80 Fed. (2d) 483),
191 the Circuit Court of Appeals for the Third Circuit held unequivocally that, upon a motion to dismiss an involuntary petition in bankruptcy, only such defects as appear upon the fact of the petition may be considered by the court, and that other issues must be raised by answer to the petition.

I do not deem it necessary to discuss other contentions made by the alleged bankrupt corporation but it may be proper to advert to one of the contentions made by the involuntary petitioners. As I understand it, it is the view of the involuntary petitioners that, in the present state of the record, the alleged bankrupt corporation has waived its right to further question the fact that it is such a corporation as could be adjudged an involuntary bankrupt under the National Bankruptcy Act. That might be so if the question of jurisdiction to have it declared a bankrupt was a matter of privilege to the alleged

bankrupt. But that is not so. Unless it falls within the character of corporations that may be adjudged involuntary bankrupts, the alleged bankrupt corporation here could not be adjudged an involuntary bankrupt, even with its consent, not alone by any other act of it in these proceedings. (*Woolsey v. Security Trust Company*, 74 Fed. (2d) 334.) And the question of whether it is exempt from bankruptcy is one which must be determined upon a full hearing of all the facts. *In re Glick, supra.*

I find that the bankrupt's motion to quash the service of process and return contained averments going to the merits of the involuntary petition in that said motion to quash averred that the alleged bankrupt corporation was not one which could be adjudicated a bankrupt, that the alleged
192 bankrupt corporation was not insolvent, and that the alleged bankrupt corporation had not committed any acts of bankruptcy.

I further find that by reason of such averments in the alleged bankrupt's motion to quash, notwithstanding it stated that the bankrupt was appearing specially, the motion to quash had the legal effect of the alleged bankrupt corporation, on its part, waiving any irregularity or invalidity in the service and of conferring upon the court jurisdiction to hear the allegations of the involuntary petition and the denials thereof of the alleged bankrupt corporation on the merits.

I, therefore, respectfully recommend that the court enter an order:

1. Striking the special appearance of the alleged bankrupt corporation;

2. Denying the alleged bankrupt's motion to quash;

3. Finding and decreeing that the alleged bankrupt has waived the question of the irregularity or invalidity of the service upon it and has conferred jurisdiction upon the court to hear the cause on the merits.

4. Ordering that the averments contained in the alleged bankrupt corporation's motion to quash and supporting affidavit, going to the merits of the involuntary petition, stand as an answer to the involuntary petition.

I am transmitting herewith the following papers:

Involuntary petition filed May 3, 1937.

Motion to quash filed by alleged bankrupt on May 18 1937.

193 Petition of Avery Brundage Company et al., filed May 24, 1937.

Answer of petitioning creditors filed May 26, 1937, to petition of Avery Brundage Company, et al.

Motion of petitioning creditors filed May 26, 1937 to strike special appearance and dismiss alleged bankrupt's motion.

Answer of E. M. Craig to petition of Avery Brundage Company, et al.

Answer of National Builders Bank of Chicago to petition of Avery Brundage Company, et al.

Supplement filed June 2, 1937 to motion of petitioning creditors to strike special appearance and dismiss alleged bankrupt's motion.

Petition of alleged bankrupt to strike petition of Avery Brundage Company, et al.

Special answer of Benjamin F. J. Odell to petition of Avery Brundage Company, et al.

Answer of William L. O'Donnell, Jr., as receiver of alleged bankrupt, to petition of Avery Brundage Company, et al.

Petition of Roy G. Harris to strike petition of Avery Brundage Company, et al.

Answer of alleged bankrupt to supplement to motion of petitioning creditors to strike special appearance and dismiss alleged bankrupt's motion.

Alleged bankrupt's Exhibits Nos. 1 and 2.

Briefs submitted on behalf of petitioning creditors.

Brief submitted on behalf of alleged bankrupt.

Respectfully submitted,
Wm. L. Sullivan,
Referee in Bankruptcy.

Dated, June 22, 1937.

79 And on, to wit, the 29th day of June, 1937, came the Dahl-Stedman Co. et al., by their attorneys and filed in the Clerk's office of said Court a certain Petition in words and figures following, to wit: Filed J 1937.

80 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—65890)

PETITION OF DAHL-STEDMAN CO., ET AL.

1. Your petitioners, Dahl-Stedman Co., et al., are all of the two hundred seventy-eight (278) contractors who filed their petition herein on May 24, 1937, under the name of

Avery Brundage Company, et al., except Avery Brundage Company, which contractor is not represented by Sigmund W. David and is not a petitioner herein, and was included in the original petition filed May 24, 1937, by inadvertence.

2. By agreement and consent of the petitioners, the respondents, William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, the Tax Service Association of Illinois, a corporation, Benjamin F. J. Odell, R. G. Harris, E. M. Craig and the National Builders Bank of Chicago, and of the petitioning creditors herein, this Court entered upon the petition of petitioners filed May 24, 1937, its order dated May 27, 1937, and pursuant to said order Two Hundred Forty-two Thousand Two Hundred Dollars ($242,200) was paid out of the Sales Tax Escrow Fund in
81 the National Builders Bank of Chicago to the Department of Finance of the State of Illinois to apply on account of principal and interest for Illinois Retailers' Occupational Taxes owing by the petitioners and the other contractors having moneys in said Sales Tax Escrow Fund.

3. Since th order of May 27, 1937, was entered, the amount in said Sales Tax Escrow Fund has been checked and the amount that each contractor had in said Sales Tax Escrow Fund has been checked and verified. On May 27, 1937, there was, in fact, on deposit in said Sales Tax Escrow Fund Three Hundred Fourteen Thousand Nine Hundred Fifty-eight Dollars and Seventy-five Cents ($314,958.75), about Seventy-five Dollars ($75) more than the amount alleged in petition of petitioners. Of said total amount in said Sales Tax Escrow Fund Two Hundred Ninety-seven Thousand Twenty-three Dollars and Five Cents ($297,023.05) was deposited therein by your two hundred seventy-seven (277) petitioners and Seventeen Thousand Eight Hundred Fifty-Nine Dollars and Five Cents ($17,859.05) thereof was deposited therein by the contractors represented by the respondent, Benjamin F. J. Odell. This leaves a balance of about Seventy-five Dollars ($75) in said Sale Tax Escrow Fund not presently accounted for. Of the Two Hundred Forty-two Thousand Two Hundred Dollars ($242,200) withdrawn from said Sales Tax Escrow Fund pursuant to the order of May 27, 1937, and paid to the Department of Finance of the State of Illinois Two Hundred Twenty-two Thousand Seven Hundred Sixty-seven Dollars and Twenty-eight Cents ($222,767.28) thereof represented payment by your petitioners on account of prin-

cipal of the taxes due by petitioners, and Five Thousand
82 Six Hundred Seventy-five Dollars and Thirty-seven Cents ($5,675.37) represented estimated interest on said principal. Therefore, of said Two Hundred Forty-two Thousand Two Hundred Dollars ($242,200) heretofore paid out of said Sales Tax Escrow Fund Two Hundred Twenty-eight Thousand Four Hundred Forty-two Dollars and Sixty-five Cents ($228,442.65) represented moneys paid by your petitioners and Thirteen Thousand Seven Hundred Fifty-seven Dollars and Thirty-five Cents ($13,757.35) represented moneys paid by the contractors represented by Benjamin F. J. Odell. There, therefore, now remains in said Sales Tax Escrow Fund Seventy-two Thousand Seven Hundred Fifty-eight Dollars and Seventy-five Cents ($72,758.75), of which Sixty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($68,580.40) is the money of and belongs to your two hundred seventy-seven (277) petitioners and Four Thousand One Hundred One Dollars and Seventy Cents ($4,101.70) is the money of and belongs to the contractors represented by Benjamin F. J. Odell. The small balance of approximately Seventy-five Dollars ($75) is still unaccounted for.

4. Pursuant to the order of this Court entered May 27, 1937, all of the respondents have filed answers to the petition of your petitioners filed May 24, 1937. Some of said respondents claim an interest in said Sales Tax Escrow Fund to the extent of Twenty Thousand Dollars ($20,000). None of said respondents claim any interest in the Sales Tax Escrow Fund or the balance remaining therein or the balance remaining therein belonging to your petitioners, in excess of
83 Twenty Thousand Dollars ($20,000). Of the Sixty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($68,580.40) now in said Sales Tax Escrow Fund in the National Builders Bank of Chicago which is the money of and belongs to your petitioners, at least Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) is the money of and belongs to your petitioners free from any claim or demand of any kind whatsoever of any of the respondents, and is the money of and belongs to your petitioners, free from all claims and demands. Your petitioners need said Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) in their respective businesses, they are not being paid any interest on said sum, and they are being damaged by the retention of said sum in said Sales Tax Escrow Fund. Your petitioners are willing to leave in said

Sales Tax Escrow Fund, subject to the further order of this Court, Twenty Thousand Dollars ($20,000) of their money until it is finally determined by this Court whether any person, firm or corporation other than your petitioners have any interest in said Twenty Thousand Dollars ($20,000) or any claim thereto, or any part thereof.

5. Each of your petitioners has, by special written authorization, authorized George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., as a Special Committee on Illinois Retailers' Occupational Tax, to act on his behalf in this proceeding and to receive on his behalf the money belonging to him in said Sales Tax Escrow Fund.

84 Wherefore your petitioners pray:

1. That this Court enter order Benjamin F. J. Odell, R. G. Harris and E. M. Craig, and each of them, to sign instanter a joint check for Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40), payable to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, to be drawn on the Sales Tax Escrow Fund at the National Builders Bank of Chicago, and deliver said check instanter to said Special Committee or any member thereof, or to Sigmund W. David, attorney for petitioners, and that the National Builders Bank of Chicago honor and pay said check out of said Sales Tax Escrow Fund upon endorsement thereof by said payee and presentation of said check for payment.

2. That the Court grant such further relief to your petitioners as may be necessary in the premises.

Dahl-Stedman Co. and the other individuals, partnerships and corporations who are petitioners herein,
By George V. Dahl,
Henry P. Reger and
Louis Narowetz, Sr.,
Special Committee on Illinois Retailers' Occupation Tax, authorized to act for and sign this petition on behalf of all of the petitioners.

Sigmund W. David,
Attorney for Petitioners.

85 State of Illinois, } ss.
County of Cook. }

George V. Dahl, being first duly sworn, on oath, deposes and says that he is the President of Dahl-Stedman Co., one of the petitioners hereinabove named; that he is the George V. Dahl who, together with Henry P. Reger and Louis Narowetz, Sr., has been designated by the petitioners as a Special Committee on Illinois Retailers' Occupation Tax and authorized to act on behalf of petitioners; that he is one of the duly authorized agents and representatives of all of the petitioners in this behalf and makes this affidavit on behalf of all of said petitioners. Affiant further says that he has read the above petition and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge and belief.

Further affiant sayeth not.

George V. Dahl.

Subscribed and sworn to before me this 25th day of June, 1937.

Nathan Chertkow,
(Seal) *Notary Public.*

86 And afterwards, to wit, on the 29th day of June, A. D. 1937, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit: Entered Ju 29, 1937

87 In the District Court of the United States.

(Caption—65890)

ORDER.

This matter coming to to be heard upon the petition of petitioners, Dahl-Stedman Co., et al., filed this day, by Sigmund W. David, attorney for petitioners, and the respondents, William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, the Tax Service Association of Illinois, a corporation, Benjamin F. J. Odell, R. G. Harris, E. M. Craig and the National Builders Bank of Chicago, the petitioning creditors in these proceedings, and certain other

parties represented by the law firm of Hopkins, Starr & Hopkins having received notice of the presentation of said petition, and all of said parties having appeared in Court and none of the respondents or other parties having made any objection to the entry of an order in accordance with the prayer of the Petition of Dahl-Stedman Co., et al., this day filed, except Benjamin F. J. Odell, R. G. Harris and the Tax Service Association of Illinois, who raised the question of the jurisdiction of the Court an order in accordance with the prayer of said petition this day filed; and

88 The Court thereupon directed said Benjamin F. J. Odell, R. G. Harris and the Tax Service Association of Illinois and each of them, to answer said petition, and each of them thereupon stated that they did not desire to answer said petition; and Benjamin F. J. Odell requested that his special answer filed June 3, 1937, to the petition of Avery Brundage Company, et al. filed May 24, 1937, stand as his answer to the petition of Dahl-Stedman Co., et al. this day filed, and R. G. Harris requested that his petition filed June 3, 1937, to strike the petition of Avery Brundage Company, et al. filed May 24, 1937, stand as his answer to the petition of Dahl-Stedman Co., et al. this day filed, and the Tax Service Association of Illinois, alleged bankrupt, requested that its petition filed June 3, 1937, to strike the petition of Avery Brundage Company, et al., filed May 24, 1937, stands as its answer to the petition of Dahl-Stedman Co., et al. this day filed;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. That the special answer of Benjamin F. J. Odell filed June 3, 1937, to the petition of Avery Brundage Company, et al. filed May 24, 1937, stand as the answer of Benjamin F. J. Odell to the petition of Dahl-Stedman Co., et al. this day filed; that the petition of R. G. Harris filed June 3, 1937, to strike the petition of Avery Brundage Company, et al. filed May 24, 1937, stand as the answer of said R. G. Harris to the petition of Dahl-Stedman Co., et al. this day filed; and that the petition of Tax Service Association of Illinois, alleged bankrupt, filed June 3, 1937, to strike the petition

89 of Avery Brundage Company, et al. filed May 24, 1937, stand as the answer of the Tax Service Association of Illinois, alleged bankrupt, to the petition of Dahl-Stedman Co., et al. this day filed.

2. That the petition of Dahl-Stedman Co., et al., this day filed, and the respective answers of Benjamin F. J. Odell, R. G. Harris and Tax Service Association of Illinois, alleged bankrupt, above set forth, are hereby referred, upon the issues made by said petition and said answers thereto, to Referee William L. Sullivan to report to this Court within a short day his conclusions thereon.

Enter

Philip L. Sullivan,
Judge.

June 29, 1937.

90 And afterwards, to wit, on the 29th day of June, A. D. 1937, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit: Entered J 29, 193

91 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

ORDER.

At Chicago, Illinois, this 29 day of June, A. D. 1937.

This cause coming on to be heard upon the alleged bankrupt's Motion to Quash, service of various process in this cause and further entry of other and further orders as prayed for in said Motion to Quash, and upon the petitioning creditors' Motion to Strike, the alleged bankrupt's special appearance and to dismiss the aforesaid Motion to Quash, and upon the report of the Special Master, William L. Sullivan, to whom the aforesaid motions were previously specially referred for consideration and recommendation, and the Court having examined the report of the said Special Master and having heard arguments of counsel and being fully advised in the premises, Finds:

That the said Special Master, William L. Sullivan, has in all respects proceeded in this matter according to law, and that his said report is well founded in every respect.

That the alleged bankrupt has waived the question of irregularity or invalidity of the service of any and all process or notice heretofore served upon it and has conferred juris-

diction upon the Court to hear the cause on the merits, and has appeared generally in this cause.

It Is Therefore Ordered that the report of the Special Master, William L. Sullivan, this day tendered to the Court, be and the same is hereby approved in every respect and ordered filed.

It Is Further Ordered that the special appearance of the alleged bankrupt corporation heretofore filed in the above entitled cause, be and the same is hereby ordered striken.

It Is Further Ordered that the alleged bankrupt's Motion to Quash the alleged services of process and return thereon, and to vacate all orders heretofore entered, as well as all other relief prayed for in the said Motion to Quash, be and the same is hereby denied, for in the said Motion to Quash, and supporting affidavit, be and the same are hereby ordered to stand as the answer of the said alleged bankrupt to the involuntary petition in bankruptcy heretofore filed in the above entitled matter.

It Is Further Ordered that the said alleged bankrupt, Tax Service Association of Illinois, be and it is hereby ordered and decreed to have appeared in this cause generally and has conferred jurisdiction upon this Court to determine the merits of this cause.

Enter:

Philip L. Sullivan,
Judge.

1 June 1937.

92 And afterwards, to wit, on the 29th day of June, A. D. 1937, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

93 IN THE DISTRICT COURT OF THE UNITED STATES.

Tuesday, June 29, A. D. 1937.

Present: Honorable Philip L. Sullivan, District Judge.

(Caption—65890)

This day comes the Bankrupt by its Attorney and enters its exceptions to the order approving the Referee's Report. On motion of Solicitor for the Bankrupt It Is Ordered

that he be and the same is hereby given to file amended answer within three (3) days from this date and

It Is Ordered that this cause be and the same is hereby referred to Referee Sullivan.

94 And on, to wit, the 2nd day of July, 1937, came the Alleged Bankrupt by its attorneys and filed in the Clerk's office of said Court a certain Amended Answer in words and figures following, to wit: Filed July 1937.

95 In the District Court of the United States.

(Caption—65890)

AMENDED ANSWER OF TAX SERVICE ASSOCIATION OF ILLINOIS.

And now the said Tax Service Association of Illinois, a corporation, Alleged Bankrupt, and denies that it has committed the acts of bankruptcy set forth in said Petition, or any of them, or that it is insolvent, and avers that it should not be declared bankrupt for any cause in said Petition alleged.

And the said Alleged Bankrupt, further answering said Petition, says:

That W. L. Eckley is not a creditor of the alleged bankrupt herein and has not a provable debt against it, and that it does not owe the said W. L. Eckley anything.

That this court has no jurisdiction to adjudicate this respondent a bankrupt for the reason that it is a not for profit corporation and is not a monied business or commercial corporation within the purview of the Bankruptcy Act; and this it prays may be inquired of by the court.

Tax Service Corporation of Illinois,
By Roy G. Harris,
Its President.

96 State of Illinois, } ss.
County of Cook. }

Roy G. Harris, being first duly sworn, on oath deposes and says that he is the President of the Tax Service Association of Illinois, a corporation, respondent herein; that he has read the foregoing Amended Answer by him subscribed, knows the contents thereof, and that the same is true.

Roy G. Harris.

Subscribed and sworn to before me this 2nd day of July, A. D. 1937.

Kathryn G. Lanahan,
Notary Public.

(Seal)

July 7. 97 And on, to wit, the 7th day of July, 1937, came Referee, William M. Sullivan, and filed in the Clerk's office of said Court a certain Report in words and figures following, to wit:

98 In the District Court of the United States.
(Caption—65890)

REPORT OF WILLIAM L. SULLIVAN, REFEREE IN BANKRUPTCY, IN RE PETITION OF DAHL-STEDMAN CO., ET AL., FILED JUNE 29, 1937, AND THE ANSWERS OF BENJAMIN F. J. ODELL, R. G. HARRIS AND TAX SERVICE ASSOCIATION OF ILLINOIS, ALLEGED BANKRUPT, THERETO.

To the Honorable Philip L. Sullivan, Judge of the United States District Court, for the Northern District of Illinois, Eastern Division, in Bankruptcy Sitting.

Honorable Sir:

On June 29, 1937, petitioners, Dahl-Stedman Co., et al., filed a petition herein alleging that they are all of the two hundred seventy-eight (278) contractors who filed their petition herein on May 24, 1937, under the name of Avery Brundage Company, et al., except Avery Brundage Company, which is not a petitioner herein and was included in the petition filed May 24, 1937, by inadvertence; that by agreement and consent to the petitioners, the respondents, William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, the Tax Service Association of

99 Illinois, a corporation, Benamin F. J. Odell, R. G. Harris, E. M. Craig and the National Builders Bank of Chicago and of the petitioning creditors herein this Court entered upon the petition of petitioners filed May 24, 1937, its order dated May 27, 1937, and, pursuant to said order, Two Hundred Forty-Two Thousand Two Hundred Dollars ($242,200) was paid out of the Sales Tax Escrow Fund in the National Builders Bank of Chicago to the Department of

Finance of the State of Illinois to apply on account of principal and interest for Illinois Retailers' Occupation Taxes owing by the petitioners and the other contractors having moneys in said Sales Tax Escrow Fund; that since the order of May 27, 1937, was entered the sums in said Sales Tax Escrow Fund had been checked; that the total amount on deposit in said Fund on May 27, 1937, was Three Hundred Fourteen Thousand Nine Hundred Fifty-eight Dollars and Seventy-five Cents ($314,958.75); that of said total amount in said Fund Two Hundred Ninety-seven Thousand Twenty-three Dollars and Five Cents ($297,023.05) was deposited therein by the two hundred seventy-seven (277) petitioners and Seventeen Thousand Eight Hundred Fifty-nine Dollars and Five Cents ($17,859.05) was deposited therein by the contractors represented by respondent, Benjamin F. J. Odell; that there remains in said Fund Seventy-two Thousand Seven Hundred Fifty-eight Dollars and Seventy-five Cents ($72,758.75), of which Sixty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($68,580.40) is the money of and belongs to the two hundred seventy-seven (277) petitioners and Four Thousand One Hundred One Dollars and 100 Seventy Cents ($4,101.70) is the money of and belongs to the contractors represented by Benjamin F. J. Odell; that, pursuant to the order of this Court entered May 27, 1937, all of the respondents have filed answers to the petition of petitioners dated May 24, 1937; that some of the respondents claim an interest in the balance of said Sales Tax Escrow Fund to the extent of Twenty Thousand Dollars ($20,000); that none of them claim any interest in the balance of the Fund over Twenty Thousand Dollars ($20,000); and that of the Sixty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($68,580.40) now in the Sales Tax Escrow Fund which is the money of and belongs to the petitioners, at least Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) is the money of and belongs to the petitioners, free from any claim or demand of any kind whatsoever; that the petitioners need said Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) in their respective businesses; that they are not being paid any interest on said sum and that they are being damaged by the retention of said sum in said Sales Tax Escrow Fund; that they are willing to leave in the Fund, subject to the further order of this Court, Twenty Thousand Dollars ($20,000) of their money until it is finally determined by this Court

whether any person, firm or corporation other than the petitioners have any interest in said Twenty Thousand Dollars ($20,000) or any claim thereto or any part thereof; that each of the petitioners has, by special written authorization, au-
thorized George V. Dahl, Henry P. Reger and Louis Nar-
101 wetz, Sr., as a Special Committee on Illinois Retailers'
Occupation Tax, to act on his behalf in this proceeding and to receive on his behalf the money belonging to him in said Sales Tax Escrow Fund.

Said petitior prays that this Court order Benjamin F. J. Odell, R. G. Harris and E. N. Craig, and each of them, to sign instanter a joint check for Forty-eight Thousand Five Hundred-Eighty Dollars and Forty Cents ($48,580.40) payable to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, to be drawn on the Sales Tax Escrow Fund at the National Builders Bank of Chicago, and deliver said check instanter to said Special Committee or any member thereof, or to Sigmund W. David, attorney for petitioners, and that the National Builders Bank of Chicago honor and pay said check out of said Sales Tax Escrow Fund upon endorsement thereof by said payees and presentation of said check for payment.

Upon the same day, June 29, 1937, your Honor entered an order referring said petition and the respective answers thereto of Benjamin F. J. Odell, R. G. Harris and Tax Service Association of Illinois to me upon the issues made by said petition and said answers thereto, to report to the Court within a short day my conclusions thereon.

A hearing was held before me on July 6, 1937, on the matters embraced in said reference, which hearing was attended by Sigmund W. David, representing the petitioners, Benjamin F. J. Odell, representing himself, Louis Kutner, representing R. G. Harris, and the Tax Service Association of Illinois, alleged bankrupt, Blanksten and Lansing, represent-
ing petioning creditors, Donald H. Haider, appearing for
102 William J. Flaherty, attorney for William L. O'Connell,
Jr., Receiver of Tax Service Association of Illinois, alleged bankrupt.

A brief statement is necessary for a proper understanding of the issues presented on this reference.

On May 24, 1937, a petition was filed herein on behalf of Avery Brundage Company, et al., the petitioners being the

same persons (except Avery Brundage Company) who filed the petition of Dahl-Stedman Co., et al., on June 29, 1937.

The petition of May 24, 1937, so far as pertinent to the present reference, alleges in substance that a certain Sales Tax Escrow Fund in the National Builders Bank of Chicago was created and controlled by a letter to said bank signed by the respondents, E. M. Craig, R. G. Harris and Benjamin F. J. Odell, and that withdrawals from the account were to be made only on written order of said Odell, Harris and Craig; that there was deposited in said Sales Tax Escrow Fund Three Hundred Fourteen Thousand Eight Hundred Eighty-five Dollars and Ninety-five Cents ($314,885.95); that there was in said fund belonging to the petitioners Two Hundred Ninety-seven Thousand Five Hundred Thirty-four Dollars and Seventy-Nine Cents ($297,534.79) or slightly in excess thereof, a large part of which they needed to pay Illinois Retailers' Occupation Tax; that the petitioners had requested and demanded of said Odell and Harris, among other things, that they execute a check to the order of the Special Committee on Illinois Retailers' Occupation Tax for the amount in said Sales Tax Escrow Fund deposited therein by the 103 petitioners or that they execute a document withdrawing their names as parties whose signatures must be on any check drawn on such Fund; that they had refused to comply with petitioners' request and demand. Said petition prayed, among other things, that Odell, Harris and Craig be ordered to issue a check for Two Hundred Ninety-seven Thousand Five Hundred Thirty-four Dollars and Seventy-nine Cents ($297,534.79) to the Special Committee on Illinois Retailers' Occupation Tax, to be drawn on the Sales Tax Escrow Fund at the National Builders Bank of Chicago.

On May 24, 1937, an order was entered by the Court giving leave to the petitioners to file their petition, making William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, Tax Service Association of Illinois, a corporation, R. G. Harris, Benjamin F. J. Odell, E. M. Craig, Ruth V. Willner, P. M. Weaver, R. D. Steele and National Builders Bank of Chicago parties respondent to the petition, and ordering O'Connell, Jr., Receiver, Tax Service Association of Illinois, Harris, Odell, Craig and the National Builders Bank of Chicago to file their respective answers to said petition before 10:00 A. M. Thursday, May 27, 1937, and that the matter be set for hearing upon the petition and said

answers before the Court at 10:00 A. M. Thursday, May 27, 1937.

On May 27, 1937, the Court entered an order on the Avery Brundage Company, et al. petition. Said order, before it was signed by the Court, was approved in writing on the last page of the order by Sigmund W. David, attorney for petitioners, E. M. Craig, William J. Flaherty, attorney for William
104 L. O'Connell, Jr., as Receiver, Luis Kutner, for Tax Service Association of Illinois, R. G. Harris, Benjamin F. J. Odell, National Builders Bank of Chicago, by Louis A. Bowman, Assistant Cashier, Blanksten & Lansing, attorneys for petitioning creditors. The first paragraph of said order is as follows:

"This matter coming on to be heard upon the petition of petitioners, Avery Brundage Company, et al., by Sigmund W. David, attorney for petitioners, and the petitioners and the respondents, William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, the Tax Service Association of Illinois, a corporation, Benjamin F. J. Odell, R. G. Harris, E. M. Craig and National Builders Bank of Chicago having appeared in open court upon the motion of petitioners, either in person or by their respective attorneys, and said petitioners and said respondents having in open court agreed that this court has jurisdiction to enter this order, and said petitioners and said respondents having agreed upon and consented to the entry of this order, and it appearing that:".

The order then ordered and decreed that there be paid instanter out of said Sales Tax Escrow Fund in the National Builders Bank of Chicago to the Department of Finance of the State of Illinois, to apply on account of principal and interest owing by the petitioners and the said other contractors for their respective Illinois Retailers' Occupation Taxes Two Hundred Forty-two Thousand Two Hundred Dollars
105 ($242,200) (being seventy-five per cent (75%) of the entire Sales Tax Escrow Fund plus Six Thousand Thirty-five Dollars and Fifty-four Cents ($6,035.54) in interest), and directed that Odell, Harris and Craig sign instanter a joint check for Two Hundred Forty-two Thousand Two Hundred Dollars ($242,200) payable to the Department of Finance of the State of Illinois drawn on said Fund. The order also provides as follows:

"4. That the balance of the money in said Sales Tax Escrow Fund in the National Builders Bank of Chicago,

amounting to Seventy-two Thousand Six Hundred Eighty-five Dollars and Ninety-six Cents ($72,685.96) shall remain and be held in said Escrow Fund in the National Builders Bank of Chicago, subject to the further order of this court.

"5. That the time for William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, the Tax Service Association of Illinois, R. G. Harris and Benjamin F. J. Odell to file their answers or other pleadings to said petition, is hereby extended to and including June 3, 1937, and all claims and rights in and to said balance of Seventy-two Thousand Six Hundred Eighty-five Dollars and Ninety-six Cents ($72,685.96) in said Sales Tax Escrow Fund in said National Builders Bank of Chicago, are hereby referred to Referee William L. Sullivan, upon the petition of petitioners and the answers and other pleadings filed and hereafter filed thereto."

106 After said agreed order of May 27, 1937, was entered, answers were filed by Odell, Harris, the Tax Service Association of Illinois, William L. O'Connell, Jr., Receiver, N. M. Craig and the petitioning creditors. None of the said answers except those of Odell, Harris and Tax Service Association of Illinois raise any questions which affect this report. The answers of Odell, Harris and Tax Service Association of Illinois were to the effect that, inasmuch as there was then pending before the Court the question of the Court's "bankruptcy jurisdiction" over the Tax Service Association of Illinois, this Court was without jurisdiction to determine any rights relating to the petition of the said Avery Brundage Company, et al.

Thereafter, pursuant to a reference to me, I filed with your Honor a report dated June 22, 1937, on the question of the Court's jurisdiction over the alleged bankrupt. My report was confirmed by an order of this Court entered June 29, 1937, and by said order the special appearance of the alleged bankrupt was stricken, its motion to quash was denied, and this Court decreed that the bankrupt had conferred jurisdiction upon the Court to hear the cause on its merits.

On June 29, 1937, the same day upon which the petition of Dahl-Stedman Co., et al., which has been previously summarized, was filed, the Court entered an order upon said petition. This order recites that petitioners, William L. O'Connell, Jr., Receiver, the Tax Service Association of

Illinois, Odell, Harris, Craig, the National Builders Bank of Chicago and the petitioning creditors appeared in Court, and that none of them made any objection to the entry of an order in accordance with the prayer of the petition of Dahl-Stedman Co., et al. except Odell, Harris and the Tax Service Association of Illinois, who raised the question of the jurisdiction of the Court to enter an order in accordance with the prayer of said petition; that the Court thereupon directed said Odell, Harris and Tax Service Association of Illinois, and each of them, to answer said petition, and each of them thereupon stated that they did not desire to answer said petition; that Odell requested that his special answer filed June 3, 1937, to the petition of Avery Brundage Company, et al. filed May 24, 1937, stand as his answer to the petition of Dahl-Stedman Co., et al.; that Harris requested that his petition filed June 3, 1937, to strike the petition of Avery Brundage Company, et al. stand as his answer to the petition of Dahl-Stedman Co., et al.; and that the Tax Service Association of Illinois requested that its petition filed June 3, 1937, to strike the petition of Avery Brundage Company, et al. stand as its answer to the petition of Dahl-Stedman Co., et al. Said order thereupon provides:

"Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

"1. That the special answer of Benjamin F. J. Odell filed June 3, 1937, to the petition of Avery Brundage Company, et al. filed May 24, 1937, stand as the answer of Benjamin F. J. Odell to the petition of Dahl-Stedman Co., et al. this 108 day filed; that the petition of R. G. Harris filed June 3, 1937, to strike the petition of Avery Brundage Company, et al. filed May 24, 1937, stand as the answer of said R. G. Harris to the petition of Dahl-Stedman Co., et al. this day filed; and that the petition of Tax Service Association of Illinois, alleged bankrupt, filed June 3, 1937, to strike the petition of Avery Brundage Company, et al. filed May 24, 1937, stand as the answer of the Tax Service Association of Illinois, alleged bankrupt, to the petition of Dahl-Stedman Co., et al. this day filed.

"2. That the petition of Dahl-Stedman Co., et al. this day filed, and the respective answers of Benjamin F. J. O'Dell, R. G. Harris and Tax Service Association of Illinois, alleged bankrupt, above set forth, are hereby referred, upon the issues made by said petition and said answers thereto,

to Referee William D. Sullivan to report to this Court within a short day his conclusions thereon."

The only issues presented to me on this reference by the petition of Dahl-Stedman Co., et al. filed June 29, 1937, and the answers of Odell, Harris and Tax Service Association of Illinois thereto are (1) the truth of the allegations set forth in the petition, the principal allegations of which are that there is now Seventy-two Thousand Seven Hundred Fifty-eight Dollars and Seventy-five Cents ($72,758.75) in the Sales Tax Escrow Fund in the National Builders Bank 109 of Chicago; that of this amount Sixty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($68,580.40) is the money of and belongs to the petitioners; that there is no claim to any part of said balance remaining in said Sales Tax Escrow Fund except as to Twenty Thousand Dollars ($20,000) thereof; and that at least Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) of the money of the petitioners in said Sales Tax Escrow Fund belongs to the petitioners, free from all claims and demands; and that each of the petitioners has, by special written authorization, authorized George V. Dahl, Henry F. Reger and Louis Narowetz, Sr. as a Special Committee on Illinois Retailers' Occupation Tax to act on his behalf in this proceeding and to receive on his behalf the money belonging to him in said Sales Tax Escrow Fund; and (2) the pendency before the Court of the question of the Court's "bankruptcy jurisdiction" over the Tax Service Association of Illinois and, therefore, the question of the jurisdiction of the Court to determine any rights relative to the Sales Tax Escrow Fund.

There is nothing before me to controvert or dispute the truth of the allegations alleged in the petition of Dahl-Stedman Co., et al. filed June 29, 1937, and they, therefore, must be taken as true.

The question whether this Court has jurisdiction to dispose of and distribute the balance in the Sales Tax Escrow Fund, as prayed for by the petition of Dahl-Stedman Co., et al., is determined by two orders of this Court; (1) the 110 agreed order entered by this Court on May 27, 1937, upon the petition of Avery Brundage Company, et al., and (2) the order of June 29, 1937, approving my report as Special Master on the question of the Court's jurisdiction over the alleged bankrupt.

It will be noted that Harris, Odell and the Tax Service Association of Illinois agreed to and approved in writing this Court's order of May 27, 1937, and that that order Specifically provided that the balance of the money (after the withdrawal of the Two Hundred Forty-two Thousand Two Hundred Dollars ($242,200) in the Sales Tax Escrow Fund in the National Builders Bank of Chicago amounting to Seventy-two Thousand Six Hundred Eighty-five Dollars and Ninety-six Cents ($72,685.96) should remain and be held in said Escrow Fund in the National Builders Bank of Chicago subject to the further order of this Court and that "all claims and rights in and to said balance of Seventy-two Thousand Six Hundred Eighty-five Dollars and Ninety-six Cents ($72,685.96) in said Sales Tax Escrow Fund in said National Builders Bank of Chicago are hereby referred to Referee William L. Sullivan upon the petition of petitioners and the answers and other pleadings filed and hereafter filed thereto".

The answers of Odell, Harris and the Tax Service Association of Illinois to the petition now before me of Dahl-Stedman Co., et al. filed June 29, 1937, are to the effect that the Court has no jurisdiction of the petition because there is pending and undetermined before the Court the question of the Court's jurisdiction over the alleged bankrupt corporation. These answers were originally filed to the petition of Avery Brundage Company, et al. filed May 24, 1937. At that time the alleged bankrupt corporation had filed a motion to quash the service upon it on the ground that the service was invalid and, therefore, the Court had no jurisdiction.

As to such motion, your Honor, on June 29, 1937, entered on order approving my report as Special Master, such order further finding that the alleged bankrupt had waived the question of irregularity or invalidity of the service of process upon it and had conferred jurisdiction upon the Court to hear the motion on the merits, such order further decreeing that the special appearance of the alleged bankrupt be stricken, that its motion to quash and its supporting affidavit stand as its answer to the involuntary petition in bankruptcy, and that the alleged bankrupt had appeared in this cause generally and had conferred jurisdiction on the Court to determine the merits of this cause.

The respondents Odell, Harris and Tax Service Associa-

tion of Illinois having, by their free and voluntary act, agreed to and approved in writing the order entered by your Honor on May 27, 1937, on the petition of Avery Brundage Company, et al., and your Honor having, in your order of June 29, 1937, decreed that the Court has jurisdiction to determine the merits of the involuntary petition in bankruptcy filed herein and the answer of the alleged bankrupt coporation thereto, it is my conclusion that there is no merit in the contention now made by Odell, Harris and the Tax Service Association of Illinois, namely: that the Court has now
112 no jurisdiction to enter any order on the petition of Dahl-Stedman Co., et al.

The respondents Odell, Harris and the Tax Service Association of Illinois have not answered the petition of Dahl-Stedman Co., et al. on the merits and, as is evidenced by the order of reference of this Court of June 29, 1937, they did not desire to answer said petition on the merits. The order of June 29, 1937, specifically directs me to report my conclusions upon the issues made by the petition of Dahl-Stedman Co., et al, and the answers thereto of Odell, Harris and the Tax Service Association of Illinois.

On said issues I find that the allegations of the petition of Dahl-Stedman Co., et al. filed June 29, 1937, are true; that the answers of Odell, Harris and the Tax Service Association of Illinois raise the question of jurisdiction only; that said answers do not present a good defense to said petition; and that the Court has jurisdiction over the Sales Tax Escrow Fund in the National Builders Bank of Chicago, the distribution thereof and of the parties thereto, including Benjamin F. J. Odell, R. G. Harris, E. M. Craig, the Tax Service Association of Illinois and the National Builders Bank of Chicago.

I, therefore, respectfully recommend that an order be entered granting the prayer of the petition of Dahl-Stedman Co., et al. filed June 29, 1937, to the following effect: that this Court order Benjamin F. J. Odell, R. G. Harris and E. M. Craig, and each of them, to sign instanter a joint check for
113 Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) payable to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, to be drawn on the Sales Tax Escrow Fund in the National Builders Bank of Chicago, and deliver said check instanter to said Special

Committee or to any member thereof, or to Sigmund W. David, attorney for petitioners, and that the National Builders Bank of Chicago honor and pay said check out of said Sales Tax Escrow Fund upon endorsement thereof by said payees and presentation of said check for payment; and that the balance remaining in said Sales Tax Escrow Fund in the National Builders Bank of Chicago shall remain and be held in said Escrow Fund in the National Builders Bank of Chicago, subject to the further order of this Court.

I am transmitting herewith the following papers:

Petition of Dahl-Stedman Co., et al. filed June 29, 1937.

Special answer of Benjamin F. J. Odell filed June 3, 1937, to the petition of Avery Brundage Company, et al. filed May 24, 1937.

Petition of R. G. Harris filed June 3, 1937, to strike the petition of Avery Brundage Company, et al. filed May 24, 1937.

Petition of Tax Service Association of Illinois filed June 3, 1937, to strike the petition of Avery Brundage Company, et al. filed May 24, 1937.

Respectfully submitted,

Wm. L. Sullivan,
Referee in Bankruptcy.

Dated, July 7, 1937.

114 And on, to wit, the 8th day of July, 1937, came Referee William L. Sullivan and filed in the Clerk's office of said Court a certain Report in words and figures following, to wit:

115 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

REPORT OF WILLIAM L. SULLIVAN, REFEREE IN BANKRUPTCY, CONCERNING REFERENCE OF CAUSE.

To the Honorable Philip L. Sullivan, Judge of the United States District Court, for the Northern District of Illinois, Eastern Division, in Bankruptcy Sitting.

Honorable Sir:

On June 29, 1937, Your Honor entered an order granting leave to the alleged bankrupt corporation to file an amended

answer to the involuntary petition in bankruptcy theretofore filed against it, and referred the matter to me as special master.

On July 2, 1937, after some discussion with the attorneys for the alleged bankrupt corporation and the involuntary petitioners, who were before me on another phase of the case, I ordered, on my own motion, that the hearing on the involuntary petition and the amended answer of the alleged bankrupt corporation be set down for hearing on September 21, 1937, at 10 A. M. From the discussion had I then felt that the latter date was not under the circumstances altogether unsatisfactory to the attorney for the alleged bankrupt corporation.

116 On July 6, 1937, the attorney for the alleged bankrupt corporation appeared before me and moved that the cause be set for trial "pursuant to rules in bankruptcy." He stated, in effect, that he desired the matter of the involuntary petition and the amended answer of the alleged bankrupt corporation heard at an earlier date than September 21, 1937—which was the date I had theretofore set for such hearing—and he directed my attention to Rule 12 of the Bankruptcy Rules of the United States District Court, which rule reads, in part, as follows:

"If an order of reference be made, it may contain appropriate provisions requiring indemnity by the parties or their attorneys or any of them for the expenses of the reference. Any such reference shall proceed from day to day, and if any of the parties fail so to proceed the Master shall promptly report that fact to the Court, with such recommendations as may appear to him to be appropriate. The Master's report shall be filed with the Clerk within ten days after the conclusion of the hearings."

In relation to the latter motion of the alleged bankrupt corporation for an earlier hearing, the attorney for the involuntary petitioning creditors objected and stated it would take him some time to prepare his side of the case, and that as it would be necessary for him to prove the insolvency of the alleged bankrupt corporation, he would have to employ an auditor to go over its books, et cetera.

117 The position of the alleged bankrupt corporation, in substance, is that while the involuntary petition is pending against it, its business is practically at a standstill. However, on June 29, 1937, Your Honor entered an order author-

izing the receiver to continue the operation of the offices and business of the alleged bankrupt.

Both the attorney for the alleged bankrupt corporation and the involuntary petitioners stated that the hearing on the involuntary petition would be protracted, each intending to call a large number of witnesses.

I stated to the attorneys that it would be impossible for me to hear the matter before September, if the hearing of evidence and the consideration of the matters presented would necessitate a great amount of time. I made such statement for the reason that my time between now and my annual vacation will be practically all taken up with matters already set or with matters I now have under advisement and upon which I will be required to report before leaving on my annual vacation. I have already booked passage and made all arrangements for my wife and myself to leave for Europe on July 23rd next on my annual vacation.

While it is, of course, only right and proper that a corporation, against whom an involuntary petition in bankruptcy is filed, should be entitled to an early hearing
118 consistent with the convenience and rules of the court, yet in this case the alleged bankrupt corporation certainly had done nothing up to this time to facilitate an early hearing upon the involuntary petition against it. The involuntary petition was filed on May 3, 1937. It contained the necessary jurisdictional allegations. On May 18, 1937, the alleged bankrupt corporation moved to quash the service of process upon it on the ground that such service was void because the person served was not, at the time of the service, associated in any capacity with the alleged bankrupt corporation.

On June 29, 1937, Your Honor entered an order confirming my report as special master relative to the bankrupt's motion to quash. In such order, Your Honor denied the alleged bankrupt corporation's motion to quash the alleged service of process and return thereon, and granted leave to the alleged bankrupt corporation to file an amended answer which was only filed on July 2, 1937.

At the hearing before me this morning on the motion of the attorney for the alleged bankrupt corporation, which was to set the involuntary petition and the amended answer for hearing earlier than September 21, 1927, I advised the attorneys that, if it is insisted that the matter be heard by me

before September, 1937, I would be impelled to request Your Honor to vacate the reference to me, and I so respectfully request accordingly as it would be a physical impossi-
119 bility for me to enter into a protracted and extended hearing upon the involuntary petition and the amended answer and to file my report as special master within ten days after the conclusion of the hearings, as required by Rule 12 above referred to, before leaving for Europe on my annual vacation concerning which I made all arrangements many months ago.

Respectfully submitted,

Wm. L. Sullivan,
Referee in Bankruptcy.

Dated, July 6, 1937.

120 And afterwards, to wit, on the 9th day of July, A. D. 1937, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit: Entered 1937.

121 In the District Court of the United States.

* * (Caption—65890) * *

Friday, July 9, A. D. 1937.

Present: Honorable Philip L. Sullivan, District Judge.

On motion of Benjamin F. J. Odell and R. G. Harris It Is Ordered that leave be and the same is hereby given them to file exceptions to the Report of the Referee within two (2) days from this date and

It Is Ordered that the hearing on the exceptions to the Report of the Referee be and the same is hereby set for hearing July 27, A. D. 1937.

122 And afterwards, to wit, on the 12th day of July, A. D. 1937, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

6 July 1937. 123 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—65890) • •

This day come Benjamin F. J. Odell and Roy G. Harris by their attorneys and enter their motion for an extension of time within which to file exceptions to the report of Referee William L. Sullivan of June 29, A. D. 1937 which motion is denied to which ruling of the Court Benjamin F. J. Odell and Roy G. Harris duly except.

July 12, 124 And on, to wit, the 12th day of July, 1937, came Benj. F. J. Odell et al. by their attorneys and filed in the Clerk's office of said Court certain Joint Exceptions in words and figures following, to wit:

125 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—65890) • •

JOINT EXCEPTIONS OF BENJ. F. J. ODELL AND ROY G. HARRIS TO THE REPORT OF WILLIAM L. SULLIVAN, REFEREE IN BANKRUPTCY IN RE PETITION OF DAHL-STEDMAN CO., ET AL., FILED JUNE 29TH, 1937.

Now comes Benj. F. J. Odell and Roy G. Harris, respondents, and except to the Referee's report on the following grounds to-wit:

1. The order of reference to the Referee dated June 29, 1937, on which his said report was based, stated erroneous facts in that the said order which was presented to the court for signature in the absence of all other counsel and without their approval states that the court directed these respondents to answer said petition and that respondents stated that they did not desire to answer said petition. Said statement is untrue as respondents did not state to the court that they did not desire to answer said peition, but did state to the court that special answers were filed questioning the jurisdiction of the court to the petition of Avery Brundage Company, et al., and thereupon the court directed respondent Odell to draft an order designating that the special answers of re-

spondents theretofore filed June 3, 1937, stand to the
126 petition of Dahl-Stedman Co., et al., dated June 29, 1937.
The said erroneous portion of said order misled the Referee in his statement of the facts and likewise in his conclusions thereon.

2. The Referee erred in stating that the only issues presented to him on said reference were (1) the truth of the allegations set forth in the petition and (2) the pendency before the court of the question of the court's "bankruptcy jurisdiction" over the Tax Service Association of Illinois and thereby the question of the jurisdiction of the court to determine rights relative to the Sales Tax Escrow Fund. On the issues made by the said petition and special answers, the merits of the petition or the truth of the allegations were not an issue.

3. The Referee erred in finding that there was nothing before him to controvert or dispute the truth of the allegations in the said petition and that they must therefore be taken as true. The question of the merits of the petition or the truth thereof were not any part of the issues referred to said Referee for decision as the only issue made up by the said petition and respondents' special answers were as to the jurisdiction of the court over the said funds pending the determination of jurisdiction in the bankruptcy proceedings and over the alleged bankrupt.

4. The Referee erred in holding that the jurisdiction of the court to dispose of and distribute the Sales Tax Escrow balance was determined by the order of court of May 27,
1937 and the order of June 29, 1937 because if that were
127 true the court would have been making an idle gesture
in referring to the Referee matters determined and already settled by the court's previous orders.

5. The Referee erred in finding that the order of May 27, 1937, waived jurisdictional pleas because 75 per cent of the fund was, by agreement of counsel, ordered paid to the Department of Finance of the State of Illinois. It was at the solicitation and suggestion of the court that said 75 per cent of the funds were distributed to the Department of Finance for the various petitioners in order to avoid a penalty against said petitioners for failure to pay said taxes within the allotted time, and it was stated by respondents and agreed to in open court that the consent requested by the court to such distribution would not prejudice the rights of respondents to

have determined the question of the jurisdiction of the court over the 25 per cent balance of said funds.

6. The Referee erred in holding that the alleged bankrupt had appeared in the cause generally and conferred jurisdiction on the court to determine the merits of the cause. If the alleged bankrupt cannot be involuntarily declared a bankrupt under the bankruptcy act, and is exempt therefrom, the court can have no jurisdiction over it, nor can the alleged bankrupt itself give the court jurisdiction when the bankruptcy act itself expressly provides otherwise.

7. The Referee erred in holding that respondents, by their free and voluntary act in approving the written order of May 27, 1937, conferred jurisdiction on the court, be-
128 cause the trial court being fully advised as to the jurisdictional questions over the alleged bankrupt directed all attorneys to sign the order so there would be no question about the court's right to distribute the 75 per cent of said funds as aforesaid. The said order was a collateral matter to the vital issues of bankruptcy jurisdiction over the alleged bankrupt.

8. The Referee erred in holding that on the pleadings before him that there was no merit in the contentions made by the special answer of respondents questioning the jurisdiction of the court pending the determination of the court's jurisdiction over the alleged bankrupt.

9. The Referee erred in holding that respondents did not desire to answer said petition on the merits as respondents are not called upon to answer said petition of the merits until the jurisdictional questions raised are finally determined and disposed of as the raising of a jurisdictional question did not deprive respondents of their right to answer to the merits, which they now specially reserve the right to do in the event they should so elect should the jurisdictional question over the alleged bankrupt and said fund be decided adversely.

10. The Referee erred in finding that the allegations of the petition are true because respondents' answers did not present a good defense to said petition and that the court thereby has jurisdiction over the said escrow fund and the distribution thereof.

129 11. The Referee erred in recommending that the court order respondents and other escrowees to sign any checks in any amount as the Referee did not have said issue before him and transcended his jurisdiction in so recommending.

12. The Referee erred in not finding that the determination of the jurisdiction of the court over the said funds could not be determined until the question of the jurisdiction of the United States District Court over the alleged bankrupt was first determined.

In conclusion respondents specially except to this court's violation of Rule No. 14 of the Bankruptcy Act as follows:

"The petition for review of a referee's order shall be filed with the referee within ten days after the order is made, unless, before the expiration of such period, the time be extended by the Court or the referee in charge of the case. Where the order is the result of a decision upon a contested matter, the time within which to file the petition for review shall begin to run from the date of the service of a copy of the referee's order upon the adverse party."

And also to this court's violation of Rule No. 66 for Courts of Equity of the United States as follows:

"The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the equity docket. The parties shall have 20 days from the time of the report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed. If exceptions are filed, they shall stand for hearing before the court, if then in session, or, if not, at the next sitting held thereafter, by adjournment or otherwise."

130 because respondents have been deprived of sufficient time to properly prepare themselves and exhaustively search for authorities to support the jurisdiction and other contentions set forth herein. The court allowed respondents in violation of said Rules only two days to file their exceptions and further ordered the arguments thereon set for the third day.

These respondents, your exceptors, therefore pray that their said exceptions may be heard and sustained.

Benj. F. J. Odell,
Respondent Pro Se.

Roy G. Harris,
By Luis Kutner,
His Attorney.

July 12, 1937.

ered July 2, 1937.

131 And afterwards, to wit, on the 12th day of July, A. D. 1937, being one of the days of the regular July term of said Court, in the record of proceedinsg thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

132 IN THE DISTRICT COURT OF THE UNITED STATES.

Monday, July 12, A. D. 1937.

Present: Honorable Philip L. Sullivan, District Judge.

(Caption—65890)

This day come Benjamin F. J. Odell and Roy G. Harris by their Attorneys and enter their motion for leave to file Second Amended Supplemental Answer to the petition of Dahl-Stedman, et al. which motion is denied to which ruling of the Court Benjamin F. J. Odell and Roy G. Harris duly except.

133 And afterwards, to wit, on the 12th day of July, A. D. 1937, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

134 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—65890)

ORDER.

This matter coming on to be heard upon the motion of petitioners, Dahl-Stedman Co., et al. for the entry of an order herein approving the report of William L. Sullivan filed with the Clerk of this Court on July 7, 1937, pursuant to the reference to the order of this Court entered June 29, 1937, and making findings and orders in accordance with the prayer of the petition of Dahl-Stedman Co., et al. filed June 29, 1937, and the recommendations of said William L. Sullivan contained in his said report; and the respondents, William L. O'Connell, Jr., Receiver of the Tax Service Association of Illinois, alleged bankrupt, Tax Service Association of Illinois, a corporation, Benjamin F. J. Odell, R. G. Harris, E. M.

Craig and National Builders Bank of Chicago, the petitioning creditors in these proceedings, and certain other parties represented by the law firm of Hopkins, Starr & Hopkins having received notice of said motion of the petitioners,
135 Dahl-Stedman Co. et al., and all of said parties having appeared in court in person or by counsel, and

Said Benjamin F. J. Odell and R. G. Harris having asked and obtained leave to file their respective exceptions to said report of William L. Sullivan and having filed the same, and this matter thereupon coming on to be heard upon the aforesaid motion of petitioners and the said exceptions to said report of William L. Sullivan filed by Benjamin F. J. Odell and R. G. Harris, and

The Court having heard the arguments of counsel and being fuly advised in the premises, Doth Find that:

(a) None of the respondents or the petitioning creditors or the parties represented by Hopkins, Starr & Hopkins, except Benjamin F. J. Odell, R. G. Harris and the Tax Service Association of Illinois, have made any objection to the entry of an order in accordance with the motion of Dahl-Stedman Co., et al., petitioners.

(b) The allegations of the petition of Dahl-Stedman Co., et al. filed June 29, 1937, are true.

(c) The answers of Benjamin F. J. Odell, R. G. Harris and the Tax Service Association of Illinois, alleged bankrupt, to said petition of Dahl-Stedman Co., et al. filed June 29, 1937, raise the question of jurisdiction of this Court only; that said answers do not present a good defense to said petition; that this Court has jurisdiction over the certain account known as the Sales Tax Escrow Fund in the National Builders Bank of Chicago, which has been specifically referred to and is
136 more fully described in the order of this Court in this cause entered May 27, 1937, on the petition of Avery Brundage Company, et al., and has jurisdiction of the distribution of said Sales Tax Escrow Fund and of the parties thereto, including Benjamin F. J. Odell, R. G. Harris, E. M. Craig, the Tax Service Association of Illinois, and the National Builders Bank of Chicago.

(d) The balance now remaining in said Sales Tax Escrow Fund in the National Builders Bank of Chicago is Seventy-two Thousand Seven Hundred Fifty-eight Dollars and Seventy-five Cents ($72,758.75), of which Sixty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($68,580.40) is the proceeds of checks of the petitioners which

were deposited in said Sales Tax Escrow Fund, and of said Sixty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($68,580.40), Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) is the money of and belongs to the petitioners, free from any claim or demand of any kind whatsoever of any of the respondents.

(e) George V. Dahl, Henry P. Roger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, are authorized to receive, on behalf of the petitoners, the moneys belonging to petitioners in said Sales Tax Escrow Fund in the National Builders Bank of Chicago.

It Is, Therefore, Ordered, Adjudged and Decreed:

1. That the exceptions of Benjamin F. J. Odell and R. G. Harris heretofore filed to the report of William L. Sullivan in re the petition of Dahl-Stedman Co., et al. filed June 29, 1937, and the answers of Benjamin F. J. Odell, R. G. Harris and Tax Service Association of Illinois, alleged bankrupt, thereto, which said report was filed with the Clerk of this Court on July 7, 1937, pursuant to an order of reference contained in the order of this Court entered June 29, 1937, be and the same are hereby overruled, and said report of William L. Sullivan filed with the Clerk of this Court on July 7, 1937, is hereby in all respects approved.

137

2. That Benjamin F. J. Odell, R. G. Harris and E. M. Craig, and each of them, sign instanter a joint check for Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) payable to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, drawn on the Sales Tax Escrow Fund in the National Builders Bank of Chicago and signed as follows: "Sales Tax Escrow Fund, by Benjamin F. J. Odell, R. G. Harris and E. M. Craig; and deliver said check instanter to said Special Committee on Illinois Retailers' Occupation Tax or to any member thereof, or to Sigmund W. David, attorney for petitioners, and that the National Builders Bank of Chicago honor and pay said check out of the account known as the Sales Tax Escrow Fund at the National Builders Bank of Chicago, upon endorsement of said check by said payees and upon presentation of said check for payment.

3. That after the payment of said check for Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40), the balance remaining in said Sales Tax Es-

crow Fund in the National Builders Bank of Chicago
138 amounting to Twenty-four Thousand One Hundred Seventy-eight Dollars and Thirty-five Cents ($24,178.35) shall remain and be held in said Escrow Fund in the National Builders Bank of Chicago, subject to the further order of this Court; and all claims and rights in and to said balance in said Sales Tax Escrow Fund in said National Builders Bank of Chicago are again hereby referred to William L. Sullivan, a Referee of this Court, upon the petition of Avery Brundage Company, et al., filed herein May 24, 1937, and the answers and other pleadings filed and which may hereafter be filed thereto.

Enter:

Philip L. Sullivan,
Judge.

July 12, 1937.

To all of which exceptions are jointly and severally taken by Benjamin F. J. O'Dell and Roy G. Harris.

Enter:

Philip L. Sullivan,
Judge.

July 12, 1937.

139 And afterwards, to wit, on the 13th day of July, A. D. 1937, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit: Entered July 13, 1937.

140 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

ORDER.

This matter coming on to be heard upon the motion of petitioners, Dahl-Stedman Co., et al., for the entry of an order herein striking the special answer of Benjamin F. J. Odell filed June 3, 1937, to the petition of Avery Brundage Company, et al., filed May 24, 1937 and striking the petition of R. G. Harris filed June 3, 1937, to strike the petition of Avery Brundage Company, et al., filed May 24, 1937, and striking the petition of Tax Service Association of Illinois, alleged

bankrupt, filed June 3, 1937, to strike the petition of Avery Brundage Company, et al., filed May 24, 1937; and ordering Benjamin F. J. Odell, R. G. Harris and Tax Service Association of Illinois, alleged bankrupt, to file within ten (10) days their respective answers to the merits of the petition of Avery Brundage Company, et al., filed May 24, 1937, as to the balance of Twenty Thousand Dollars ($20,000) remaining in the Sales Tax Escrow Fund in the National Builders Bank of Chicago claimed by the petitioners to belong to them after the payment to them of Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) in accordance with the order of July 12, 1937, and

141 The Court being fully advised in the premises, Doth Find that:

(a) The special answer of Benjamin F. J. Odell filed June 3, 1937, to the petition of Avery Brundage Company, et al., filed May 24, 1937, the petition of R. G. Harris filed June 3, 1937, to strike said petition of Avery Brundage Company, et al., and the petition of Tax Service Association of Illinois, alleged bankrupt, filed June 3, 1937, to strike the said petition of Avery Brundage Company, et al., raise only the question of jurisdiction of this Court; that said answer and petitions to strike do not present a good defense to said petition of Avery Brundage Company, et al.; this Court has jurisdiction over the balance of Twenty Thousand Dollars ($20,000) remaining in the Sales Tax Escrow Fund in the National Builders Bank of Chicago and claimed by petitioners to belong, after the payment to them of Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) in accordance with the order of July 12, 1937, and has jurisdiction of the distribution of said Twenty Thousand Dollars ($20,000).

It Is, Therefore, Ordered Adjudged and Decreed:

1. That the motion of petitioners, Dahl-Stedman Co., et al., this day made is allowed.

2. That said special answer of Benjamin F. J. Odell, the said petition to strike of R. G. Harris, and the said petition to strike of Tax Service Association of Illinois, alleged bank-

142 rupt, all filed June 3, 1937, are hereby stricken.

3. That Benjamin F. J. Odell, R. G. Harris and Tax Service Association of Illinois, alleged bankrupt, file within Twenty (20) days their respective answers to the merits of the petition of Avery Brundage Company, et al., filed May 24, 1937, as to said balance of Twenty Thousand Dollars ($20,000) remaining in the Sales Tax Escrow Fund in the National Build-

ers Bank of Chicago claimed by the petitioners to belong to them after the payment to them of Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) in accordance with the order of July 12, 1937.

Enter:

Philip L. Sullivan,
Judge.

July 13, 1937.

194 And on, to wit, the 21st day of July, 1937, came Dahl-Stedman Co., et al., by their attorneys and filed in the Clerk's office of said Court a certain Petition in words and figures following, to wit: Filed July 21 1937.

195 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

PETITION.

To the Judges of the District Court of the United States.

1. Your petitioners, Dahl-Stedman Co., et al., respectfully represent that on July 12, 1937, upon the motion of petitioners for the entry of an order approving the report of William L. Sullivan filed with the Clerk of this Court on July 7, 1937, pursuant to the reference in the order of this Court entered June 29, 1937, and making findings and orders in accordance with the prayer of the petition of Dahl-Stedman Co., et al., filed June 29, 1937, and the recommendations of said William L. Sullivan contained in his report, and upon the exceptions to said report of William L. Sullivan filed by respondents, Benjamin F. J. Odell and R. G. Harris, this Court entered an order providing, among other things, as follows:

"That Benjamin F. J. Odell, R. G. Harris and E. M. Craig, and each of them, sign instanter a joint check for Forty-
196 eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) payable to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, drawn on the Sales Tax Escrow Fund in the National Builders Bank of Chicago and signed as follows: 'Sales Tax Escrow Fund, by Benjamin F. J. Odell, R. G. Harris and E. M. Craig,' and deliver said check instanter to said Special Committee on Illinois Retailers' Occupation Tax or to any member thereof, or

to Sigmund W. David, attorney for petitioners, and that the National Builders Bank of Chicago honor and pay said check out of the account known as the Sales Tax Escrow Fund at the National Builders Bank of Chicago, upon endorsement of said check by said payees and upon presentation of said check for payment."

A copy of said order entered by this Court on July 12, 1937, is marked "Exhibit A", hereto attached and incorporated herein with the same force and effect as if it had been set out in this petition in full. The said Benjamin F. J. Odell, R. G. Harris, E. M. Craig and the National Builders Bank of Chicago had due notice of the entry of said order, and said order remains in full force and effect, unreversed, and no stay thereof has been granted or allowed by this or any other Court.

2. That the said E. M. Craig, so far as he is individually able to do so, has fully complied with said order by signing a check for Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) payable to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, drawn on the Sales Tax Escrow Fund in the National Builders Bank of Chicago and signed "Sales Tax Escrow Fund, by E. M. Craig," and delivering said check, so signed, to Sig-
197 mund W. David, attorney for petitioners, and the National Builders Bank of Chicago has informed petitioners that it is willing to comply with the terms of said order applicable to it.

3. That there is now in the said Sales Tax Escrow Fund in the National Builders Bank of Chicago Seventy-two Thousand Seven Hundred Fifty-eight Dollars and Seventy-five Cents ($72,758.75), subject to the order of the said Benjamin F. J. Odell, R. G. Harris and E. M. Craig under the terms and provisions of said order of this Court of July 12, 1937.

4. That said Benjamin F. J. Odell and R. G. Harris, and each of them, have utterly failed, neglected and refused to carry out and perform the terms and requirements of said order and have failed, neglected and refused to sign a joint check for Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) payable to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, drawn on the Sales Tax Escrow Fund in the National Builders Bank of Chicago, and have utterly failed, neglected and refused to deliver any such check to the Special Committee on

Illinois Retailers' Occupation Tax or to any member thereof or to Sigmund W. David, attorney for petitioners, and said Benjamin F. J. Odell and R. G. Harris, and each of them, still persist in their refusal, neglect and failure to sign and deliver said check; that said failure, neglect and refusal on the part of said Benjamin F. J. Odell and R. G. Harris to sign
198 said check, described in said order, and to deliver said check as in said order provided, is willful, contumacious and in contempt of this Court and the process thereof.

Your petitioners, therefore, pray that an order may be entered herein directing said Benjamin F. J. Odell to show cause in writing on or before the 26th day of July, A. D. 1937, why he should not be punished for contempt of court for willfully and contumaciously failing, neglecting and refusing to obey and comply with said order of this Court entered herein on July 12, 1937, and directing said R. G. Harris to show cause in writing on or before the 26th day of July, A. D. 1937, why he should not be punished for contempt of court for willfully and contumaciously failing, neglecting and refusing to obey and comply with said order of this Court aforesaid entered herein on July 12, 1937.

And your petitioners will ever pray.

Dahl-Stedman Co. and the other individuals, partnerships and corporations who are petitioners herein,
By George V. Dahl,
Henry P. Reger, and
Louis Narowetz, Sr.,
Special Committee on Illinois Retailers' Occupation Tax, authorized to act for and sign this petition on behalf of all the petitioners.

Sigmund W. David,
Attorney for petitioners.

199 State of Illinois, }
County of Cook. } ss.

George V. Dahl, being first duly sworn, on oath deposes and says that he is the President of Dahl-Stedman Co., one of the petitioners hereinabove named; that he is the George V. Dahl who, together with Henry P. Reger and Louis Narowetz, Sr., has been designated by the petitioners as a Special Committee on Illinois Retailers' Occupation Tax and author-

ized to act on behalf of the petitioners; that he is one of the duly authorized agents and representatives of all of the petitioners in this behalf and makes this affidavit on behalf of all the petitioners. Affiant further says that he has read the above and foregoing petition and knows the contents thereof, and that the matters and things therein stated are true in substance and in fact.

Geo. V. Dahl.

Subscribed and sworn to before me this 20th day of July, 1937.

(Seal) William J. Lederer,
Notary Public.

Note: Order of July 12, 1937, attached, marked Exhibit A, not copied.

July 21, 200 And afterwards, to wit, on the 21st day of July, A. D. 1937, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly, District Judge, appears the following entry, to wit:

201 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—5890) * *

ORDER.

This cause coming on to be heard before this Court upon the petition of Dahl-Stedman Co., et al., this day filed, for a rule on Benjamin F. J. Odell and R. G. Harris to show cause why they, and each of them, should not be punished for contempt of this Court for willfully and contumaciously failing, neglecting and refusing to comply with and obey the order of this Court entered herein on July 12, 1937, and the Court having considered said petition and the files, records and proceedings herein, and the said petitioners herein appearing herein by Sigmund W. David, their attorney, and the said Benjamin F. J. Odell appearing in person and the said R. G. Harris appearing herein by Luis Kutner, his attorney; and

The Court being fully advised in the premises, finds that:

1. On July 12, 1937, this Court entered an order herein

providing, among other things, that the said Benjamin F. J. Odell, R. G. Harris and E. M. Craig, and each of them, 202 sign instanter a joint check for Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) payable to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, drawn on the Sales Tax Escrow Fund in the National Builders Bank of Chicago and signed as follows: "Sales Tax Escrow Fund, by Benjamin F. J. Odell, R. G. Harris and E. M. Craig," and deliver said check instanter to said Special Committee on Illinois Retailers' Occupation Tax or to Sigmund W. David, attorney for petitioners.

2. There is now in the said Sales Tax Escrow Fund in the National Builders Bank of Chicago Seventy-two Thousand Seven Hundred Fifty-eight Dollars and Seventy-five Cents ($72,758.75), subject to the order of the said Benjamin F. J. Odell, R. G. Harris and E. M. Craig under the terms and provisions of the said order of this Court of July 12, 1937.

3. That E. M. Craig has fully and completely complied with the terms of said order so far as he is individually able to do so, and has signed a check for Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) payable to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, drawn on the Sales Escrow Fund in the 203 National Builders Bank of Chicago and signed as follows: "Sales Tax Escrow Fund, by E. M. Craig," and has delivered said check to Sigmund W. David, attorney for petitioners.

4. That Benjamin F. J. Odell and E. M. Craig, and each of them, have utterly failed, neglected and refused to carry out and perform the terms and requirements of said order, and have failed, neglected and refused to sign a check for Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40), payable to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, drawn on the Sales Tax Escrow Fund in the National Builders Bank of Chicago, and signed as follows: "Sales Tax Fund, by Benjamin F. J. Odell, R. G. Harris and E. M. Craig," and have utterly failed, neglected and refused to deliver such a check instanter to said Special Committee on Illinois Retailers' Occupation Tax

or to any member thereof, or to Sigmund W. David, attorney for petitioners.

It Is, Therefore, Ordered, Adjudged and Decreed that Benjamin F. J. Odell show cause in writing on July 31, 1937 at the hour of 10:00 o'clock A. M. before this Court, why he should not be punished by this Court for willfully and contumaciously failing, neglecting and refusing to comply with and
obey the order of this Court entered herein on July 12,
204 1937, and that R. G. Harris show cause in writing on July 31, 1937, at the hour of 10:00 o'clock A. M. before this Court, why he should not be punished by this Court for willfully and contumaciously failing, neglecting and refusing to comply with and obey the order of this Court entered herein on July 12, 1937.

Enter:

Holly,
Judge.

July 21, 1937.

ed July 1937.

143 And afterwards, to wit, on the 23rd day of July, A. D. 1937, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly, District Judge, appears the following entry, to wit:

144 In the District Court of the United States.

* * (Caption—65890) * *

ORDER.

This cause coming on to be heard upon the motion of Roy G. Harris, Tax Service Association of Illinois and Benjamin F. J. Odell, by their respective attorneys, on written motion for leave to reserve exceptions to the order of July 13, 1937, requiring the above named parties to answer to the merits of the Avery Brundage Company, et al., petition, heretofore filed herein, and the Court, being fully advised in the premises, hereby grants leave to the above parties to reserve their exceptions to the order of July 13, 1937, and the same are hereby reserved.

Enter:

Holly,
Judge.

July 23, 1937.

205 And on, to wit, the 30th day of July, 1937, came Roy G. Harris, et al. by their attorneys and filed in the Clerk's office of said Court a certain Joint Motion in words and figures following, to wit: Filed July 1937.

206 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

JOINT MOTION TO DISMISS PETITION AND QUASH RULE TO SHOW CAUSE.

Now come Roy G. Harris and Benjamin F. J. Odell and move the Court to dismiss the petition and quash the rule to show cause, heretofore filed July 21, 1937, for the following reasons:

1. These respondents submit that on the 12th day of July, 1937, before his Honor Judge Philip L. Sullivan, when order was entered on petition of Dahl-Stedman Co., et al., in this cause, the following conversation took place between counsel at this hearing and his Honor Judge Sullivan:

"Mr. David: I have a check here and I asked the gentlemen whether they would sign it, in view of the court order. They said no, they are going up. In view of the fact that your Honor is leaving town, I think that if they have a right to appeal, which I doubt, because I don't believe either one of them has any appealable interest—* * *

The Court: What do you think the amount of the bond ought to be?

Mr. Odell: There is no petition before the Court yet, your Honor. I think Mr. David is a little previous.

The Court: Well, I do that very often, however, if you promise that you are going to take an appeal; I mean assuming that you have an appealable interest. Now, at the
207 time that statement is made I set the amount of the bond and so forth, as a matter of convenience, if nothing else.

Mr. Odell: Well, I think it should be for costs only, if it is a matter of the amount of the bond, because the funds are all intact. No one is getting them or taking them. They are not in any way touched. There is no detriment, and we should be able to get an appeal disposed of at the October term. * * *

(Lengthy discussion of counsel then took place as to the amount of the bond.)

The Court: Bond a thousand dollars.

Mr. David: The costs would be more than that, your Honor.

Mr. Kutner: How can you say that?

Mr. David: Because if they are keeping the distribution of this fund for that length of time, let's say that the appeal is granted and they keep the $48,500 that they are going to distribute; now, if it were distributed the parties to whom it would be distributed would be in—could place it where it would draw interest.

The Court: No, only a cost bond; a thousand dollars. * * *"

The interpretation put upon this language by counsel for said respondents was that the appeal would take place in due course and that the fixing of the bond was tantamount to a stay of the order of July 12, 1937, requiring the signing of said check instanter because the refusal to sign the same was made in the presence of his Honor Judge Sullivan with the knowledge of all counsel present and the arranging of the bond following such knowledge was a completion of the interpretation and meeting of the minds of court and counsel.

2. Further answering these respondents say that they have continually worked toward the perfection of their
208 appeal and have had no intention at any time, or have any intention now, to violate any orders of the court but do desire to preserve and prosecute their rights as allowed by law.

3. Further answering these respondents deny they have committed any act which may be construed as contempt of the order of July 12, 1937.

4. Further answering these respondents aver that the order of July 12, 1937, directed these respondents to sign instanter the check calling for the payment of $48,584.40; that their frank disclosure to the Court at that time of their intention to appeal relieves them of any and all burdens of conduct which may be construed as contemptuous.

5. Further answering these respondents say that counsel for petitioners at said time did not disclose to the Court a contrary interpretation as to the discussion which then took place nor did they disclose a contrary interpretation at the succeeding hearing when they appeared the succeeding day before his Honor Judge Sullivan on another petition in said cause.

6. Further answering these respondents say that the petition and the rule to show cause is filed in bad faith and in

total disregard to the clear language of the Court in fixing the amount of the appeal bond and therefore should be stricken from the files; that the petitioners by their petition for rule to show cause are attempting to distort and circumvent the sincere statements by these respondents of their intention to perfect an appeal.

209 7. Further answering these respondents aver that in compliance with the suggestion of his Honor Judge Sullivan they a now expeditiously perfecting their appeal.

Respondents therefore submit, that as stated above, the order entered herein, calling upon the respondents to show cause, should be quashed and the petition as the foundation thereof should be dismissed and stricken from the files, and respondents so pray.

Roy G. Harris,
Benjamin F. J. Odell.

July 30, 1937.

State of Illinois, } ss.
County of Cook. }

Roy G. Harris and Benjamin F. J. Odell being first duly sworn on oath depose and say that they have read the foregoing answer and know the contents thereof and state that the same are true in substance and in fact except as to those portions that are founded upon information and belief and as to such portion believe it to be true.

Roy G. Harris,
Benjamin F. J. Odell.

Subscribed and sworn to before me this 29th day of July, 1937.
(Seal)

Ruth V. Willner,
Notary Public.

210 And on, to wit, the 30th day of July, 1937, came the Alleged Bankrupt, et al. by their attorneys and filed in the Clerk's office of said Court a certain Special Answer in the words and figures following, to wit:

July 30. 211 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—65890)

SPECIAL ANSWER TO THE PETITION OF AVERY BRUNDAGE CO., ET AL., ON ORDER OF JULY 13, 1937, TO ANSWER TO THE MERITS.

The Tax Service Association of Illinois, Alleged Bankrupt, Roy G. Harris and Benjamin F. J. Odell, in compliance with the order of July 13, 1937, directing the above mentioned parties to answer to the merits of the petition of Avery Brundage Co., et al., heretofore filed, for such answer say:

1. That the above respondents heretofore filed petition to strike the petition of Avery Brundage Co., et al., raising the question of this court's jurisdiction over the "Sales Tax Escrow Fund" and that said petition and the petition of Avery Brundage Co., et al., were referred for a hearing to Referee William L. Sullivan;

2. That a hearing was had upon the foregoing and the report of the said referee was filed wherein it was found that the above mentioned respondents had conferred jurisdiction upon this court by consenting to the order of May 27, 1937, and that this court had jurisdiction of the fund for all purposes.

212 3. That an order was entered by this Court approving the report of said Referee to which your respondents duly excepted and are now perfecting an appeal therefrom.

4. That the question of jurisdiction over the subject matter of the alleged bankrupt is now pending undisposed of and undetermined before this Court, said question of jurisdiction of the subject matter being raised in the amended answer of the alleged bankrupt.

5. That the order of July 13, 1937, striking the several petitions to strike the petition of Avery Brundage Co., et al., and the further order directing the respondents to answer to balance of the fund therein remaining in the "Sales Tax Escrow Fund".

6. That these respondents, jointly and severally, aver that in view of their intention to perfect an appeal to the Circuit Court of Appeals for the Seventh Circuit, reviewing the order of July 12, 1937 and other orders theretofore and subsequently entered, these respondents now specifically re-

serve the right in his answer to question the jurisdiction of this court in so requiring them to answer to the merits as hereinabove alleged.

7. These respondents further answering aver that in view of the foregoing to specifically reserve the exception to the order of July 13, 1937, directing these respondents to answer to the merits and that said reservation should continue until the question of jurisdiction over the alleged bank-
213 rupt is determined before this Court and the jurisdiction of this Court over your respondents relative to the Escrow Fund finally determined by the Circuit Court of Appeals for the Seventh Circuit, your respondents should not be compelled to answer to the merits.

And your respondents will ever pray.

Tax Service Association of Illinois, Alleged Bankrupt.
Roy G. Harris,
By Luis Kutner,
Their Attorney.
Benjamin F. J. Odell,
Counsel Pro Se.

July 30, 1937.

145 And on, to wit, the 30th day of July, 1937, came Roy G. Harris, et al. by their attorneys and filed in the Clerk's office of said Court a certain Petiton for Appeal and Severance in words and figures following, to wit: Filed July 30, 1937.

146 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

PETITION FOR APPEAL AND SEVERANCE.

Now comes Roy G. Harris of Du Page County, Illinois and Benjamin F. J. Odell, of Cook County, Illinois, and conceiving themselves aggrieved, by the order of this Court in the above entitled cause, entered on the 12th day of July and the 13th day of July 1937, on the petitions of Dahl-Stedman Company, et al., and Avery Brundage Company, et al., respectively, in the above entitled proceedings, appeal from said orders to the Circuit Court of Appeals for the Seventh Circuit of the United States, and pray that this appeal may be allowed; and that a transcript of the record upon which

said orders were made, duly authenticated, may be sent to the Circuit Court of Appeals for the Seventh Judicial Circuit of the United States, and that said orders may be reversed.

Your petitioners respectfully show to the Court that on July 26, 1937 they notified, in writing, William L. O'Connell, Receiver for the Tax Service Association of Illinois, alleged bankrupt, E. M. Craig, one of the escrowees of a certain fund in dispute, the National Builders Bank of Chicago, depositary where said disputed funds are kept, Otto C. Bentner, and Blanksten & Lansing, Attorneys for petitioning creditors of these petitioners' intention to pray an appeal and asked them whether they would or would not join in said appeal in said cause and to so advise petitioners in writing in reply to said inquiry but your petitioners have not been advised in writing that any of said notified parties desire to join in this appeal.

Wherefore petitioners pray for an order of severance and for the granting of an appeal as above prayed.

Luis Kutner,
Attorney for Roy G. Harris.
Benjamin F. J. Odell,
Counsel Pro Se.

Dated: July 30, 1937.

Entered Aug. 2, 1937.

147 And afterwards, to wit, on the 2nd day of August, A. D. 1937, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

148 In the District Court of the United States.

* * (Caption —65890) * *

Monday, August 2, A. D. 1937.

Present: Honorable Charles E. Woodward, District Judge.

This day come Benjamin F. J. Odell and Roy G. Harris by their Attorneys and enter their motion for order of severance and appeal and for leave to file Assignment of Errors which motion is denied to which ruling of the Court Benjamin F. J. Odell and Roy G. Harris except.

149 And on, to wit, the 25th day of September, 1937, came Roy G. Harris, et al. by their attorneys and filed in the Clerk's office of said Court a certain Notice of filing Praecipe in words and figures following, to wit:

150 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

NOTICE OF FILING PRAECIPE.

To: David & Fainman
38 South Dearborn Street
Chicago, Illinois

Please take notice that on or before the 25th day of September, 1937, the undersigned will file with the Clerk of said Court, on the appeal allowed in the above entitled cause, a praecipe showing particular parts of the record of this case needed for review by the upper Court, a copy of which praecipe is herewith served upon you as Attorneys for Avery Brundage Company and Dahl-Stedman Company, et al., as Appellees.

Kenart M. Rahn,
Attorney for Roy G. Harris, et al.
Benjamin F. J. Odell,
Counsel Pro Se.

September 21, 1937.

Received a copy of the above and foregoing notice, together with copy of praecipe referred to therein, this 21st day of September, 1937, at 4:45 P. M.

Sigmund W. David,
Attorneys for said Appellees.

214 And on, to wit, the 29th day of September, 1937, came Dahl-Stedman Co. et al. Appellees by their attorney and filed in the Clerk's office of said Court a certain Notice in words and figures following, to wit:

215 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—65890) * *

NOTICE.

To: Kenart M. Rahn,
7 S. Dearborn Street,
Attorney for Appellants.

Please take notice that on or before September 30, 1937, I shall file with the Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division, a praecipe requesting said Clerk to include in the transcript of record to be prepared by him and sent by him to the Clerk of the United States Circuit Court of Appeals, for the Seventh Circuit, in the appeal pending in said Court from this cause, certain additional matters a copy of which praecipe is hereby served upon you, as attorney for appellants, Roy G. Harris and Benjamin F. J. Odell.

September 29, 1937.

Sigmund W. David,
Attorney for Dahl-Stedman Co., et al., Appellee.

Received a copy of the above and foregoing notice, together with a copy of the praecipe referred to therein, this 29th day of September, A. D. 1937.

(Signed) Kenart M. Rahn,
Per E. P. G.,
Attorney for said appellant, Roy G. Harris and Benjamin F. J. Odell.

216 And on, to wit, the 25th day of September, 1937, came Roy G. Harris, et al., by their attorneys and filed in the Clerk's office of said Court a certain Praecipe in words and figures following, to wit:

217 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Sept. 2 1937.

• • (Caption—65890) • •

PRAECIPE.

To: The Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division.

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals, for the Seventh Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record, the following, to wit:

1. Bankruptcy petition filed May 3, 1937.
2. Motion, May 18, 1937, to quash alleged service of process and return thereon and to vacate all orders heretofore entered.
3. Leave to Avery Brundage Company, et al., on May 24, 1937, to file instanter petition and rule on all parties to answer in three days and set for hearing May 27, 1937.
4. Petition of Avery Brundage Company, et al., filed May 24, 1937.
5. Answer of petitioning creditors to Avery Brundage Company, et al. filed May 26, 1937.
6. Order of May 27, 1937 in re payment of certain funds and extension of time to file answers etc.

218 7. Order of May 27, 1937 vacating order of May 18, 1937 and referring cause to Referee Sullivan.

8. Special answer of Benjamin F. J. Odell, filed June 3, 1937, to petition of Avery Brundage Company, et al.
9. Petition of Roy G. Harris, filed June 3, 1937.
10. Petition of Tax Service Association of Illinois, filed June 3, 1937.
11. Petition, filed June 29, 1937, of Dahl-Stedman Company, et al.
12. Leave, granted June 29, 1937, Dahl-Stedman Company, et al., to file petition and special answers to stand and reference to Referee Sullivan.
13. Order of June 29, 1937, approving Referee Sullivan's report on notice to quash etc. and exceptions by bankrupt to order approving Referee's report and leave to file amended answer in three days and cause referred to Referee.

14. Amended answer of Tax Service Association of Illinois, filed July 2, 1937.

15. Report of Referee Sullivan in re petition of Dahl-Stedman Company, et al., etc. filed July 7, 1937.

16. Report of Referee Sullivan concerning reference of cause, filed July 8, 1937.

17. Rule, July 9, 1937, on Odell and Harris to file exceptions to Referee's report in two days and cause set for hearing July 12, 1937.

18. Motion of Harris and Odell, July 12, 1937, for extension of time in which to file exceptions to report of Referee and denial thereof and exceptions.

19. Joint exceptions of Harris and Odell to Referee's report filed July 12, 1937.

219 20. Order, July 12, 1937, of denial to Harris and Odell to file second amended and supplemental answer to petition of Dahl-Stedman, et al.

21. Order, July 12, 1937, overruling exceptions to Master's (Referee's) report and approval of report and exceptions.

22. Order, July 13, 1937, striking special answer of Benjamin F. J. Odell and petitions of R. G. Harris and Tax Service Association to strike petition of Avery Brundage Company, et al. etc.

23. Order of July 23, 1937, reserving exception to order of July 13, 1937, to answer Avery Brundage Company et al., petition on the merits.

24. Petition for Appeal and Severance.

25. Order allowing Appeal and Severance. (denied)

30. Notice of filing Praecipe.

31. This Praecipe for transcript of record and service thereof.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Seventh Circuit and to be filed in the office of the Clerk of the said Circuit Court of Appeals for the Seventh Circuit, at Chicago, Illinois, within the time required by law and the rules of said Court.

Kenart M. Rahn,
Attorney for Roy G. Harris.
Benjamin F. J. Odell,
Counsel Pro Se.

September 21, 1937

220 Service of the above Praecipe accepted and acknowledged this 21st day of September, 1937.

Sigmund W. David,
Attorneys for Appellees.

221 And on, to wit, the 29th day of September, 1937, came the Appellees by their attorney and filed in the Clerk's office of said Court a certain Praecipe in words and figures following, to wit: Filed Sept. 29, 1937.

222 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—65890) * *

APPELLEES' PRAECIPE.

To: The Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division.

You are hereby requested to include in the transcript of record to be filed in the United States Circuit Court of Appeals, for the Seventh Circuit, pursuant to an appeal allowed in the above entitled cause, the additional matters following, to-wit:

1. Motion of petitioning creditors filed May 26, 1937, to strike special appearance of bankrupt and to dismiss bankrupt's motion to quash.

2. Answer of National Builders Bank of Chicago filed May 27, 1937, to petition of Avery Brundage Company, et al. filed May 24, 1937.

3. Answer of E. M. Craig filed May 27, 1937, to petition of Avery Brundage Company, et al. filed May 24, 1937.

4. Answer of William L. O'Connell, Jr., as Receiver of the Tax Service Association, filed June 8, 1937, to petition of Avery Brundage Company, et al. filed May 24, 1937.

223

5. Master's report on motion of alleged bankrupt to quash service, etc. filed June 23, 1937.

6. Petition of Dahl-Stedman Co., et al. for rule on Odell and Harris to show cause why they should not be held in contempt, filed July 21, 1937.

7. Order on Odell and Harris to show cause, entered July 21, 1937.

8. Joint motion of Odell and Harris filed July 30, 1937, to dismiss petition and quash rule to show cause.

9. Petition of Odell and Harris for leave to appeal and for a supersedeas, filed July 30, 1937, in the United States District Court.

10. Special answer of Tax Service Association, Odell and Harris filed July 30, 1937, to petition of Avery Brundage Company, et al. on order of July 13, 1937, to answer to the merits.

11. Order of the United States District Court denying Odell and Harris leave to appeal and supersedeas, entered August 2, 1937.

12. Notice of filing this praecipe for additional matters in the transcript of record, served on attorney for appellants.

13. This praecipe for additional matters in the transcript of record, and service thereof.

Kindly include the above described additional matters in the transcript of record in the above entitled cause to be prepared by you as required by law and the rules of this Court and of the United States Circuit Court of Ap-
224 peals for the Seventh Circuit, and to be filed in the Office of the Clerk of said Circuit Court of Appeals for the Seventh Circuit, Chicago, Illinois, within the time required by law and the rules of said Court.

Sigmund W. David,
Attorney for Dahl-Stedman Co., et al., Appellees.

225 Northern District of Illinois } ss.
Eastern Division }

I, Henry W. Freeman, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipes filed in this Court in the cause entitled In Re Tax Service Association of Illinois, a corporation, Alleged Bankrupt, No. 65890, as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this ____ day of October 16th, A. D. 1937.

Henry W. Freeman,
(Seal) *Clerk.*

And on, to wit: On the Eleventh day of August, 1937, the following Assignment of Errors was filed in the Office of the Clerk of the U. S. Circuit Court of Appeals, to wit: Filed Aug. 1937.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In Re Tax Service Association of Illinois, Alleged Bankrupt.	In Bankruptcy No. 65890.

ASSIGNMENT OF ERRORS.

And now comes Roy G. Harris, and Benjamin F. J. Odell, Appellants in this cause, and make and file this their Assignment of Errors and say that in the record in said cause there is manifest error in this, namely:

1. The Court erred in assuming jurisdiction over funds and controversies not involved in the bankruptcy matter.
2. The Court erred in taking jurisdiction over funds specially agreed not to be within its jurisdiction pending the determination of other jurisdictional questions.
3. The Court erred in ordering payment of the funds involved until the question of the bankruptcy of the Alleged Bankrupt was first decided.
4. The Court erred in the entry of the orders of July 12, 1937 and July 13, 1937.
5. The Court erred in restricting the time, in violation of the rules of Court, for Harris and Odell to file exceptions to the Referee's report.
6. The Court erred in refusing extension of time to Harris and Odell to file exceptions.
7. The Court erred in confirming the Referee's report on the Dahl-Stedman Company, et al., petition.
8. The Court erred in denying Harris and Odell leave to answer to the merits of the petitions and in striking their special answers to the jurisdiction of the Court.
9. The Court erred in denying leave to Harris and Odell to file amended or supplemental answer to the petition of Dahl-Stedman Company, et al.
10. The Court erred in not striking the said petitions.
11. The Court erred in denying motion for immediate hear-

ing on the issue of the jurisdiction over the subject matter and as to the other issues raised by the petition in bankruptcy and amended answer of alleged bankrupt.

12. The Court erred in denying leave of Harris and Odell to appeal.

Wherefore these Appellants pray that the decrees and orders herein may be reversed and for such other and further relief as to the court may seem just and proper.

K. M. Rahn,
Attorney for Roy G. Harris.
Benjamin F. J. Odell,
Counsel Pro Se.

August 10, 1937.

Sept. 1937.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

Saturday, September 11, 1937.

Before

Hon. Evan A. Evans, Circuit Judge,
Hon. William M. Sparks, Circuit Judge,
Hon. J. Earl Major, Circuit Judge.

In the Matter of Tax Service Association of Illinois, Alleged Bankrupt. Benjamin F. J. Odell, et al., *Petitioners.*	Petition for Leave to Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day comes Benj. F. J. Odell and Roy G. Harris and present a petition for leave to appeal from the orders of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered in this cause on July 12, 1937, and on July 13, 1937, and also present a petition for a supersedeas and a petition for severance of parties.

On consideration whereof, it is now here ordered that the said petition for leave to appeal be and the same is hereby granted, and an appeal is hereby allowed from said orders of said District Court entered on July 12, 1937, and on July 13, 1937. Bond for costs in the amount of $250.00 to be filed in 10 days.

It is further ordered that a supersedeas be and the same is

hereby granted in this cause on the filing of a bond in the sum of Sixty Thousand Dollars ($60,000.00).

It is further ordered that the petition for severance be and the same is hereby granted, and the parties are hereby severed in accordance with the prayer of the said petition.

United States of America, } ss.

The President of the United States, To Avery Brundage Company, et al., and Dahl-Stedman Co., et al., Appellees, and Sigmund W. David, Their Counsel, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to an appeal, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Seventh Circuit wherein Roy G. Harris and Benjamin F. J. Odell are appellants, and you are appellees, to show cause, if any there be, why the orders rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William M. Sparks, Judge of the United States Circuit Court of Appeals this Eleventh day of September, in the year of our Lord one thousand nine hundred and Thirty-seven.

William M. Sparks,
(United States Circuit Judge.)

On this 24th day of September, in the year of our Lord one thousand nine hundred and Thirty-seven, personally appeared Mary Ellen Burr before me, the subscriber, Ruth V. Willner and makes oath that she delivered a true copy of the within citation to Sigmund W. David, Counsel for Appellees.

Sworn to and subscribed the 24th day of September, A. D. 1937.

Ruth V. Willner,
(Seal) *Notary Public.*

(Endorsed) No. 6355 United States Circuit Court of Appeals Seventh Circuit In Re Tax Service Association of Illinois, Alleged Bankrupt. Citation. U. S. C. C. A. 7. Filed Sep 25 1937 Frederick G. Campbell, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 121, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the nineteenth day of November, 1937, upon which the following entitled cause was heard and determined:

In the Matter of: Tax Service Association,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
Appellants,

vs.

Avery Brundage Company, *et al.*, and
Dahl-Stedman Co., *et al.*,
Appellees,

No. 6355, October Term, 1937, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 4th day of May, A. D. 1938.

(Seal)

Frederick G. Campbell,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room, in the City of Chicago, in said Seventh Circuit, on the fifth day of October, 1937, of the October Term, in the year of our Lord one thousand nine hundred and thirty-seven, and of our Independence the one hundred and sixty-second.

In the Matter of:
Tax Service Association,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
6355 *vs.*
Avery Brundage Company, *et al.*, and Dahl-Stedman Co., *et al.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

And, to-wit: On the seventh day of October, 1937, the following further proceedings were had and entered of record to-wit:

Thursday, October 7, 1937.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.

In the Matter of:
Tax Service Association,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
6355 *vs.*
Avery Brundage Company, *et al.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the Order entered by this Court in this cause on September 11, 1937, be and it is hereby modified by reducing the amount of the supersedeas bond to seventy-five hundred dollars.

And afterwards, to-wit: On the third day of November, 1937, there was filed in the office of the Clerk of this Court, a Supersedeas Bond, which said Bond is in the words and figures following, to-wit:

No. 6355

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In Re
Tax Service Association of Illinois,
Alleged Bankrupt.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

SUPERSEDEAS BOND.

Know All Men by These Presents That we, Roy G. Harris and Benjamin F. J. Odell, as principle, and United States Fidelity & Guaranty Company, a corporation, as surety, are held and firmly bound unto Dahl-Stedman Co., *et al.* (Dahl-Stedman Co., *et al.* being all of the two hundred and seventy-eight (278) individuals, firms and corporations—except Avery Brundage Company—specified and named as petitioners in their petition filed May 24, 1937, in the case entitled "In re Tax Service Association of Illinois, Alleged Bankrupt", pending in the District Court of the United States for the Northern District of Illinois, Eastern Division, and Numbered In Bankruptcy No. 65890), hereinafter called the "Obligees", in the full and just sum of Seventy-five Hundred Dollars ($7500) to be paid to the said Obligees, their attorneys, attorneys in fact, their respective executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals this 25th day of October, A. D. 1937.

Whereas lately as a session of the District Court of the United States, for the Northern District of Illinois, in a certain suit pending in said Court entitled "In Re Tax Service Association of Illinois, Alleged Bankrupt", and Numbered In Bankruptcy No. 65890, certain orders were entered therein on July 12, 1937, and July 13, 1937, in favor of the above spe-

cified Obligees and against Roy G. Harris and Benjamin F. J. Odell and others, and the said Roy G. Harris and Benjamin F. J. Odell having petitioned for and been allowed by the United States Circuit Court of Appeals for the Seventh Circuit an appeal to the said United States Circuit Court of Appeals from said orders of July 12, and July 13, 1937, of the said District Court of the United States to reverse the said orders of July 12 and July 13, 1937, and a citation having been issued directed to said Obligees citing them to be and appear at the United States Circuit Court of Appeals at Chicago within thirty (30) days from the date of said citation;

Now, the condition of the above obligation is such that, if the said Roy G. Harris and Benjamin F. J. Odell shall prosecute their said appeal to effect, and shall answer and pay to the said Obligees, their attorneys, attorneys in fact, respective executors, administrators or assigns, all damages, interest and costs that may be awarded against the said Roy G. Harris and Benjamin F. J. Odell, or either of them, and shall obey or comply with the orders of July 12 and July 13 1937, of the said District Court of the United States, if they fail to make good their plea, then this above obligation to be void; otherwise to remain in full force and virtue. Payment to Obligees of any payments due to Obligees under this bond shall be made by making payment to George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax.

Signed, Sealed and Delivered this 25th day of October, 1937.

Roy G. Harris (Seal)
Benjamin F. J. Odell (Seal)
United States Fidelity and
Guaranty Company,
By: Philip E. Horgan (Seal)
Attorney-in-Fact.

Endorsed: Filed November 3, 1937. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the third day of November, 1937, the following further proceedings were had and entered of record, to-wit:

Wednesday, November 3, 1937.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.

In the Matter of:
Tax Service Association,
Alleged Bankrupt.

Roy G. Halls, *et al.*,
vs.
Avery Brundage Company, *et al.*

6355

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered that the supersedeas bond of appellant filed this day in this cause be and the same is hereby approved.

And afterwards, to-wit: On the ninth day of March, 1938, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 6355. October Term—1937—January Session—1938.

In the Matter of
TAX SERVICE ASSOCIATION OF ILLINOIS,
Alleged Bankrupt.

ROY G. HARRIS and BENJAMIN F. J. ODELL,
Appellants,

vs.

AVERY BRUNDAGE COMPANY, *et al.*, and DAHL-STEFMAN CO., *et al.*,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

March 9, 1938.

Before EVANS, SPARKS and MAJOR, *Circuit Judges.*

MAJOR, *Circuit Judge.* This is an appeal from orders of the District Court, in a bankruptcy proceeding, directing that certain funds be turned over to appellees. The latter are contractors, members of various trade associations, and on April 9, 1935, through such associations, entered into an agreement with the Tax Service Association of Illinois, the alleged bankrupt, by which the latter agreed to act for the members of such associations in litigating the question of whether the Illinois Retailers' Occupation Tax, commonly known as the Sales Tax, applied to contractors. The alleged bankrupt, in accordance with said agreement, was paid $1500 in advance and was to receive an additional compensation not to exceed $20,000 if the Supreme Court of Illinois decided the Sales Tax question favorable to appellees. The alleged bankrupt agreed to retain Benjamin F. J. Odell, one of the appellants,

to act for and on behalf of appellees, but without expense to them, and it, in conjunction with Odell, was to have control of the procedure to be followed in making the monthly tax returns as was provided by the Sales Tax Act, including the escrowing or depositing of the same. The agreement was signed on behalf of the alleged bankrupt by appellant, Harris, its Vice President; and Odell, in writing, consented to his employment according to the terms of the agreement. Shortly after the execution of said agreement, appellants, Odell and Harris, together with E. M. Craig, directed a letter to the National Builders Bank of Chicago, calling the bank's attention to the opening of an account in the said bank entitled Sales Tax Escrow Fund. The letter specifically stated that these three persons had no interest in the funds, but that the same were under their custody and control pending the outcome of proposed negotiations with the Department of Finance of the State of Illinois, and the letter also contained directions that the funds were to be paid out only on checks signed by the persons whose signatures appeared on the letter. Odell conducted negotiations with the State Finance Department and also instituted a suit in the Circuit Court of Cook County for the purpose of obtaining a construction of the Act which would exempt appellees from the payment of the tax. He was not successful in the Circuit Court and appealed the matter to the Supreme Court of the State, where he was also unsuccessful. In the meantime, appellees made their monthly tax returns to the alleged bankrupt, which kept records showing the amounts paid by each and which sums were deposited in the escrow fund.

On May 3, 1937, an involuntary petition in bankruptcy was filed against the Tax Service Association of Illinois, but for some reason which we are unable to ascertain from the record, an adjudication has not been made. At such time there was in the escrow fund $297,000 and on May 24, 1937, appellees, by a sworn petition, intervened in the bankruptcy proceeding, alleging that said money belonged to them and requested that it be returned. At that time the books and records of the bankrupt, as well as the tax returns and duplicates made by appellees, were in the possession of appellants, who appellees claim were merely acting as the agents of the bankrupt.

On May 26, 1937, an agreed order was entered, returning to appellees 75% of the money in the escrow fund. The order recited that all the interested parties, including appel-

lants, appeared in open court and agreed that the court had jurisdiction and consented to its entry. The order, among other things, decreed that the balance of the money in the escrow fund was $72,758.75 and the same should remain and be held in said escrow fund in the National Builders Bank of Chicago, subject to the further order of the court. In said order appellants were given until June 3rd to file their answer or other pleadings to appellees' petition, at which time an answer was filed alleging the court to be without jurisdiction to determine any rights relating to the escrow fund.

In the meantime it had been ascertained of the $72,758.75 in the escrow fund, $68,580.40 belonged to appellees. It seems that Odell had represented certain other clients whose sales tax money had been deposited in the fund, which accounts for the discrepancy in the amount stated. The receiver of the bankrupt, by answer, claimed that by reason of the agreement of April 9, 1935, he was entitled to $20,000 of this fund. June 29, 1937, appellees filed a petition asking that $48,580.40 be turned over to them, leaving $20,000 in the fund, about which there might be a dispute. Appellants again objected solely upon the grounds that the court was without jurisdiction to determine to whom the fund belonged. The court determined it had jurisdiction, both of the parties and the res. While appellants contend they have never been given an opportunity to answer the petition as to its merits and have never had a hearing upon the same, the order of the court entered June 29, 1937, recites: "The court thereupon directed said Benjamin F. J. Odell, R. G. Harris and the Tax Service Association of Illinois, and each of them, to answer said petition, and each of them thereupon stated that they did not desire to answer said petition," and further recites that they desire to stand upon the jurisdictional question theretofore raised. The petition and the answer raising the jurisdictional question were referred to a referee, who, on July 7, 1937, made his report. The referee recommended that appellees' request be allowed, and that the sum of $48,580.40 be paid to the appellees, which, by the terms of the report left $20,000 in the escrow fund. The court allowed appellants two days to file exceptions thereto, which it is claimed was in violation of a rule by which they were entitled to ten days. Nevertheless, such exceptions were filed and overruled by the court in its order of July 12, 1937.

Upon motion of appellants, another order was entered by

the court on July 13th, which among other things, directed appellants within 20 days to file their respective answer as to any claim or interest they might have in the remaining $20,000 of the escrow fund. So far as the record discloses, no such answer has ever been filed. The orders of July 12th and July 13th are appealed from.

The essential question presented by the appeal is whether the court had jurisdiction to disburse the controverted fund. It is the contention of appellants that neither they nor appellees were parties to the bankruptcy proceeding and that the controversy, therefore, is one between two third parties having no connection with the alleged bankrupt or its affairs. It is claimed they were in custody and control of the escrow fund as the agents of appellees, while appellees contend they were acting on behalf of the alleged bankrupt. While it may be said the record does not expressly so show, yet the circumstances are such that the latter contention must be accepted. The escrow provision was a part of the agreement between appellees and the alleged bankrupt. The bankrupt, under the agreement, was to employ Odell to conduct the litigation regarding the validity of the tax. For that purpose, under the agreement, he plainly was the agent of the bankrupt. Harris was Vice President of the bankrupt and the money in question was collected by it and deposited in an account which was opened under their direction. It seems to us, even though it has been finally determined the bankrupt had no interest in the escrow fund, that the same was so closely connected with its affairs in that it was controlled and in the custody of its officers and agents, that the court properly acquired jurisdiction of the fund. If we be wrong in this view, however, the agreed order of May 27, 1937, expressly conferred jurisdiction. Here all the parties, including appellants, were in court, and all agreed that court should assume jurisdiction of the controverted fund and make disbursement of the same. It would seem the court, at that time, might have been somewhat dubious of the situation as each party in interest, either personally or by attorney, was required to and did approve said order in writing.

It is insisted, however, by appellants, that jurisdiction can not be conferred by consent. Many cases are cited in support of this contention, but we think they are distinguishable from the situation here. As was said in *Page* v. *Arkansas Natural Gas Corporation*, 53 F. (2d) 27, on page 33:

"So far as concerns jurisdiction over property, the

actual or constructive possession, after the filing of the bankruptcy petition, by the bankruptcy receiver, trustee, marshal, or referee, or by the bankrupt or his agents, or by someone not claiming beneficial interest (as, for example, custodians and court officers holding under nullified liens by legal proceedings, etc.) constitutes '*custodia legis*' for the purpose of 'assumption of jurisdiction' by the bankruptcy court. And the bankruptcy court 'assumes jurisdiction' over 'property,' and the property comes into its '*custodia legis*,' if, after the filing of the bankruptcy petition, it is in the custody or control of the receiver in bankruptcy, or of the trustee, marshal, referee, bankrupt, bankrupt's agent, or of someone not claiming beneficial interest, such as custodians or court officers under nullified liens by legal proceedings. In *Murphy* v. *John Hofman Co.*, 211 U. S. 562, 568, 29 S. Ct. 154, 156, 53 L. Ed. 327, the court says: 'But, where the property in dispute is in the actual possession of the court of bankruptcy, there comes into play another principle, not peculiar to courts of bankruptcy, but applicable to all courts, Federal or state.' "

Every litigant, of course, is entitled to an opportunity to be heard upon the merits of a suit to which he may be a party or interested. Appellants do not state, but intimate they have some interest in the funds in question. If so, they should have asserted such claim. It can not be said they did not have an opportunity to do so. On one occasion the court expressly directed them to file an answer as to the merits, but this they refused or neglected to do. Even as to the $20,000 remaining in the fund, they were given permission to answer as to the merits, but instead they appeal on the alleged jurisdictional matter. Under such circumstances they are in no position to here complain of the denial of a right which they could have availed themselves of had they so desired. What interest in this fund they might assert, we do not know, but we are convinced from an examination of the record they could have no interest or claim for services rendered in connection with the litigation in the matter of the sales tax, as the agreement between appellees and the alleged bankrupt explicitly provided that such services were to be paid for by the latter and without cost to appellees. While the record is confusing in some respects, we are satisfied the court had jurisdiction and that appellants had ample oppor-

tunity to assert any claim which they might have had to the fund in question.

The orders complained of are

AFFIRMED.

Endorsed: Filed March 9, 1938. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the ninth day of March, 1938, the following further proceedings were had and entered of record, to-wit:

Tuesday, March 9, 1938.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.

In the Matter of:
Tax Service Association,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
6355 *vs.*
Avery Brundage Company, *et al.*, and Dahl-Stedman Co., *et al.*,

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On Consideration Whereof: It is now here ordered, adjudged and decreed by this Court that the Orders or Decrees of the said District Court in this cause appealed from be, and the same are hereby affirmed with costs.

And afterwards, to-wit: On the twenty-third day of March, 1938, there was filed in the Office of the Clerk of this Court, a Petition that Mandate provide for payment of Costs, Interest and Damages, which said Petition is in the words and figures following, to-wit:

No. 6355

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of
Tax Service Association of Illinois,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
Appellants,
vs.
Avery Brundage Company, *et al.*, and Dahl-Stedman Co., *et al.*
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

PETITION OF APPELLEES THAT THE MANDATE OF THIS COURT PROVIDE THAT APPELLANTS ODELL AND HARRIS PAY APPELLEES COSTS, INTERESTS AND DAMAGES.

To the Honorable Judges of the United States Circuit Court of Appeals:

On March 9, 1938, this Court filed its decision affirming the orders of the District Court appealed from. The order of July 12, 1937, appealed from ordered appellants Odell and Harris to sign a joint check on the Sales Tax Escrow Fund at the National Builders Bank of Chicago for Forty-eight Thousand and Five Hundred Eighty Dollars and Forty Cents ($48,580.40) and deliver it to appellees.

After the petition of appellants for leave to appeal was allowed by this Court, this Court denied appellants' motion to excuse them from filing a supersedeas bond, and directed

that appellants filed a supersedeas bond in the sum of Seventy-five Hundred Dollars ($7500) with good surety. This Court also refused to accept the form of supersedeas bond submitted by appellants, and directed appellants to file the form of supersedeas bond submitted by appellees, which appellants did. The supersedeas bond provides, in part:

> "Now, the condition of the above obligation is such that, if the said Roy G. Harris and Benjamin F. J. Odell shall prosecute their said appeal to effect, and shall answer and pay to the said Obligees, their attorney, attorneys in fact, respective executors, administrators or assigns, all damages, interest and costs that may be awarded against the said Roy G. Harris and Benjamin F. J. Odell, or either of them, and shall obey and comply with the orders of July 12, and July 13, 1937, of the said District Court of the United States, if they fail to make good their plea, then the above obligation to be void; otherwise to remain in full force and virtue. Payment to Obligees of any payment due to Obligees under this bond shall be made by making payment to George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax."

Rule 12 of the rules of this Court provides:

> "Supersedeas and cost bonds must be taken with good and sufficient sureties that appellant will diligently prosecute his appeal to effect and answer all damages and costs if he fail to make his appeal good."

It appears in the record in this case that the Sales Tax Escrow Fund is on deposit in the National Builders Bank of Chicago and is drawing no interest. By reason of the appeal in this case, appellees will have been deprived of the use of their Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) from July 12, 1937, until Odell and Harris comply with the order of July 12, 1937. As a matter of right, appellees are, therefore, entitled to an order in the mandate of this Court that appellants pay appellees (but not out of the Sales Tax Escrow Fund, which belongs to appellees and not to appellants) appellees' costs in this Court and interest at the rate of five per cent (5%) on Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) from July 12, 1937, until the date that Odell and Harris comply with and fulfill the order of the District Court of July 12, 1937. Interest is a proper charge under a supersedeas bond where the supersedeas delays the payment of a

fund to the party finally determined to be the owner of it. Substantially the same situation was presented in the case of

Brame v. *Keystone Credit Corporation*, 76 F. (2d) 328 (C. C. A. 4th Cir. 1935).

In that case an order was entered that a certain fund in the hands of a receiver be paid to appellees. The appellants tied up the fund by an attachment, and, having lost in the court below, delayed distribution by securing a supersedeas on appeal. The court said, in part, page 331:

> "Where the supersedeas delays the payment of a fund to the party finally determined to be the owner of it, it is difficult to see why the interest, at the legal rate that would have been earned during the time of the delay, brought about by the appeal and supersedeas, is not properly recoverable. * * * The appeal might have been prosecuted without a supersedeas, but it was elected not to do so, and a bond was given conditioned to save the appellees and cross-appellants harmless from any damages they might suffer incident to the appeal. Having elected to take this course, it is only just that those responsible for the delay in the payment to the lawful owners of the funds should respond in damages in a sum equal to the amount of the loss brought about by the course pursued. As an element of damages, interest is a proper item to be included."

Rule 26 of the rules of this Court provides:

> "1. Where judgments for the payment of money are affirmed, and interest is properly allowable, it shall be calculated from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment was rendered.
>
> "2. In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have been sued out merely for delay, damages at a rate not exceeding 10 per cent, in addition to interest, may be awarded upon the amount of the judgment.
>
> "3. Paragraphs 1 and 2 of this rule shall be applicable to decrees for the payment of money in cases in equity, unless otherwise specially ordered by this court."

This Court is familiar with the record in this case and, therefore, no extended discussion is necessary at this time to show to this Court that the appeal in this case appears

to have been sued out merely for the purpose of delay. This is, therefore, a most proper case for the award to appellees of damages of ten per cent (10%) of Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40), in addition to interest, to be paid to appellees by appellants.

As was pointed out in appellees' brief, appellants had no possible interest in the Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) they were ordered to turn over to appellees, and there was no reason for their refusing to comply with the order of July 12, 1937, except to harass appellees and prevent them from getting the money which belonged to them so that appellees would be inclined to pay something to appellants to which appellants were not entitled. If there ever was an appeal in this Court which was prosecuted for the purpose of delay and which did delay the proceedings of the lower court, this is the case. It is, therefore, respectfully submitted that paragraph 2 of Rule 26 should be applied and that the mandate of this Court, in addition to affirming the orders of the District Court of July 12, and July 13, 1937, should provide that appellants pay to appellees, out of their own money, interest and costs as hereinabove requested, plus damages in an amount equal to ten per cent (10%) of Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40).

Rule 26 is similar to the rule in other United States Courts of Appeals and in the Supreme Court of the United States, and has been frequently applied in cases similar to the instant case.

In

Hughes on Federal Practice, Jurisdiction & Procedure, Vol. 8, page 112,

the author says:

> "Parties should not be subjected to delay without reasonable cause, and the power of the courts to compensate for unwarranted delay, through the award of damages, ought not to be overlooked. It is exercised in proper cases, to discourage or prevent frivolous appeals taken merely to gain time.
>
> * * *
>
> "Judgments have been affirmed with ten per centum damages in many cases, where the defendants have prosecuted proceedings for a review for the purpose of delay."

In

Chicago Bonding & Surety Co. v. *United States, for Use of Frank Adams Electric Co., et al.*, 261 F. 266 (C. C. A. 7th Cir.),

this Court said, page 269:

"We have treated the case thus fully in order to justify our conviction that a clear case, with no defense, has been obstructed in order to delay payment. * * * Taxable costs cannot be made to reimburse the claimants for the expenses for briefs and oral arguments on appeal. Paragraph 3 of rule 28 (235 Fed. xii, 148 C. C. A. xii) should be applied.

"The decree is affirmed, with interest and costs, and with damages in the sum of 10 per cent. of the face of the claims."

In

Wagner Electric Manufacturing Co. v. *Lyndon*, 262 U. S. 226, 67 L. Ed. 961,

the plaintiff, Lyndon, recovered a judgment of Twelve Thousand Dollars ($12,000) against the defendant, Wagner Co., in the Circuit Court of Missouri. The judgment was affirmed by the Supreme Court of Missouri. The defendant, Wagner Co., then paid the amount of the judgment to the Sheriff, and the Wagner Co. thereupon filed a bill for an injunction against Lyndon and the Sheriff in the District Court of the United States, to enjoin the Sheriff from paying the money to Lyndon and Lyndon from receiving it. The bill was dismissed, Wagner Co. appealed, and the Circuit Court of Appeals affirmed the decree of the District Court. Wagner Co. then brought the case to the Supreme Court of the United States. The court, by Mr. Chief Justice Taft, said, page 964:

"We are asked by counsel for appellees to impose a penalty on the appellant for delay. The history of the case and the conduct of the Wagner Company leave no doubt that the litigation in the Federal jurisdiction and the successive appeals have been prosecuted solely for delay. Have we power to impose damages in this case?

"Section 1010 of the Revised Statutes (Comp. Stat. Sec. 1671, 6 Fed. Stat. Anno. 2d ed. p. 228) provides as follows:

" 'Section 1010. Where upon a writ of error, judgment is affirmed in the Supreme Court or a circuit court, the court shall adjudge to the respondent in error just

damages for his delay and single or double costs at its discretion.'

"Section 1012 has the effect to make section 1010 applicable to appeals in equity. The second paragraph of the 23d Rule of this court provides that

"'In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court and shall appear to have been sued out for delay, damages at a rate not exceeding 10 per cent in addition to interests shall be awarded upon the amount of the judgment.'

"The third paragraph is:

"'The same rule shall be applied to decrees for the payment of money in cases in equity unless otherwise ordered by this court.'

"An objection to allowing damages in the present case suggesting itself is that the decree appealed from was not a money judgment. It is true that this whole litigation in the Federal jurisdiction has been initiated and carried on solely to secure the delay of the payment of a money judgment in the state court, but that is hardly within the exact terms of the 23d Rule. Sections 1010 and 1012, Revised Statutes, are, however, not so restrictive, and they give this court power to impose just damages upon the affirmance of any judgment or decree, for delay. *Gibbs* v. *Dickman*, 131 U. S. clxxxvi. and 26 L. ed. 177, appx.

"The case should be dismissed for lack of jurisdiction because the grounds of appeal are frivolous. In a dismissal on this ground a penalty may be imposed just as if upon an affirmance. *Deming* v. *Carlisle Packing Co.* 226 U. S. 102, 109, 57 L. ed. 140, 144, 33 Sup. Ct. Rep. 80.

"We think that damages of $1,500 for delay are not excessive in this case. We therefore direct the dismissal of the appeal, with damages of $1,500, and the taxation of costs as upon an affirmance of the decree of the District Court."

In

Robertson v. *Wilkinson*, 10 F. (2d) 311 (C. C. A. 5th Cir.),

the court said on page 312:

"The conclusion is irresistible that this appeal was taken for purposes of delay only. The Revised Statutes authorize the assessment of just damages for delay—on writ of error in common-law actions by section 1010

(Comp. St. 1671) and on appeal in equity cases by section 1012 (1673). Rule XXX of this court authorizes damages for delay at a rate not exceeding 10 per cent. upon the amount of the judgment.

"Under the circumstances, in our opinion the full amount of damages authorized ought to be assessed."

To the same effect see

Deming v. *Carlisle Packing Co.*, 226 U. S. 102.

Appellees have actually suffered damages, by reason of this appeal, at least equal to the said ten per cent (10%) of the Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) that appellants were ordered to turn over to appellees by the District Court order of July 12, 1937. Without going into detail, the following are some of the proceedings that were necessary in this Court:

(a) Studying petition and brief of Odell and Harris for leave to appeal, and examining law.

(b) Preparation of answer of appellees to appellants' petition for leave to appeal, and brief in support of answer.

(c) Study of appellants' reply to appellees' answer.

(d) Study of petitions of appellants for leave to appeal without supersedeas bond.

(e) Preparation of appellees' answer to appellants' petitions for leave to appeal without supersedeas bond.

(f) Conferences with Clerk of the District Court in regard to the transcript of the record.

(g) Preparation of objections to form of supersedeas bond proposed to be filed by appellants, and drawing and submitting new form of bond, with suggestions in support thereof.

(h) Study of printed transcript of record.

(i) Studying brief of appellants.

(j) Preparation of brief of appellees.

(k) Studying appellants' reply brief.

(l) Preparation for oral argument, and making oral argument.

Appellees have not only been deprived of interest on their money, but have also been deprived of the use of their money for their needs in their businesses and the payment of taxes. Appellees have also, by reason of appellants' appeal, which was essentially frivolous and prosecuted solely for the purpose of delay, been compelled to have their attorneys perform extensive services. If this Court orders Odell and Harris to pay appellees their costs and interest on the Forty-

eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40), plus damages of ten per cent (10%) of said sum, the amount realized by appellees and paid to them by appellants will be merely compensation to appellees for the damages they have suffered by reason of this appeal prosecuted solely for the purposes of delay.

It is, therefore, respectfully submitted that this Court include in its mandate that appellants Odell and Harris and the surety on their supersedeas bond pay to appellees, out of their own moneys and not out of the Sales Tax Escrow Fund, appellees' costs, interest at the rate of five per cent (5%) per annum on Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) from July 12, 1937, until compliance by Odell and Harris with the order of the District Court of July 12, 1937, and, in addition thereto, damages of ten per cent (10%) of Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) amounting to Four Thousand Eight Hundred Fifty-eight Dollars ($4,858); and that payment to appellees of said sums shall be made by appellants making payment thereof to George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, as is specifically provided in the supersedeas bond filed in this cause.

Respectfully submitted,
Dahl-Stedman Co., *et al.*,
Appellees,
By George V. Dahl,
Henry P. Reger and
Louis Narowetz, Sr.,
Special Committee on Illinois Retailers' Occupation Tax,
By Geo. V. Dahl.

Sigmund W. David,
Attorney for Appellees.

State of Illinois }
County of Cook } ss.

George V. Dahl, being first duly sworn, on oath deposes and says that he is President of Dahl-Stedman Co., one of the appellees; that he is the George V. Dahl who, together with Henry P. Reger and Louis Narowetz, Sr., has been designated by the appellees as a Special Committee on Illinois Retailers' Occupation Tax, and authorized to act on behalf of appellees; that he is one of the duly authorized agents and representatives of all of the appellees, and makes this affidavit on behalf of all of said appellees. Affiant further says that he has read the above petition and knows the contents thereof; and that the matters and things therein stated are true to the best of his knowledge and belief.

Geo. V. Dahl.

Subscribed and sworn to before me this 23rd day of March, A. D. 1938.

(Seal)

Nathan Chertkow,
Notary Public.

Endorsed: Filed March 23, 1938. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-ninth day of March, 1938, there was filed in the office of the Clerk of this Court, a Petition for a Rehearing, which said Petition for a Rehearing is in the words and figures following, to-wit:

No. 6355

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT

OCTOBER TERM, 1937—JANUARY SESSION, 1938.

In the Matter of

TAX SERVICE ASSOCIATION OF ILLINOIS,

Alleged Bankrupt.

ROY G. HARRIS and BENJAMIN F. J. ODELL,

Appellants.

vs.

AVERY BRUNDAGE COMPANY, et al., and DAHL-STEDMAN CO., et al.,

Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

PETITION FOR REHEARING.

KENART M. RAHN,

Counsel for Appellants.

BARNARD & MILLER, Printers, FRAnklin 0562, CHICAGO

U. S. C. C. A. 7
FILED
MAR 29 1938

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT

OCTOBER TERM, 1937—JANUARY SESSION, 1938.

In the Matter of

TAX SERVICE ASSOCIATION OF ILLINOIS,

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ROY G. HARRIS and BENJAMIN F. J. ODELL

Appellants,

vs.

AVERY BRUNDAGE COMPANY, et al., and DAHL-STEDMAN CO., et al.,

Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

Your petitioners, appellants in the above entitled cause, present this their petition for rehearing and respectfully submit to the court that after careful reading of the opinion filed in said cause they are forced to conclude that certain material facts in this proceeding have been overlooked or misapprehended by the court. The law bearing upon certain issues in the case has been misconstrued; distinctions have been misapprehended, and certain vital and material points necessary to a

correct decision have been inadvertently omitted from consideration.

The Court has failed to appreciate, whether with or without an answer, there was no disposition of the case below on the merits and therefore findings here of various facts are unwarranted. There has been no hearing on the Avery Brundage Petition, no hearing on answers of Craig, the Receiver, the Bank, or Petitioning Creditors concerning the $72,000, yet this court has made findings of fact which could only be determined after a hearing on those answers. The Court overlooked the fact that neither Appellants nor Appellees were parties to the bankruptcy proceeding. The Court overlooked the abuse of discretion of the trial court in entertaining the collateral proceedings prior to adjudication. The Court overlooked errors as set forth in exceptions to Master's report.

Jurisdiction.

This court has on pages four and five of its opinion, depended upon the case of *Page* v. *Arkansas National Gas Corporation* in 53 Fed. (2d) 27, 33, to support its conclusion that jurisdiction of the court was conferred in the case at bar, by consent of the parties. We believe what follows will convince this court that the Page case is confusing and does not correctly state the law applicable to the instant case.

An appeal was taken in the Page case to the United States Supreme Court on the question of the jurisdiction of the court (286 U. S. 269; 52 Sup. Ct. 507; 76 L. Ed. 1096). In affirming the decision of the District Court in the Page case, the Supreme Court based its affirmance on the specific language of the

Bankruptcy Act, Par. 23B. The Supreme Court said (286 U. S. 269, 270):

> The Receiver (later the trustee) in the bankruptcy proceeding there had gone into possession of the leasehold, claiming it as property of the bankrupt. The Court then continues on page 271:
>
> "The right asserted before the referee by the trustee in bankruptcy to compel a conveyance to the bankrupt of property adversely claimed, is one which may be asserted by the trustee in a plenary suit. By Par. 23 (a) of the Bankruptcy Act and Par. 291 of the Judicial Code, District Courts of the United States, which by Par. 1 (8) of the Bankruptcy Act are courts of bankruptcy, are given jurisdiction of all controversies in law or equity between trustees and adverse claimants concerning the property claimed by the trustee. And by Par. 23 (b), 'suits by the trustee, shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant. * * *' For reasons stated at length in the opinion in *Macdonald* v. *Plymouth County Trust Co.*, decided this day, ante, p. 263, we hold that the referee is a court within the meaning of Par. 23 (b) and that, respondent's predecessor having consented to litigate the issues presented by the petition and answer before the referee, the latter had jurisdiction to decide the issues presented."

It is apparent that the Supreme Court in arriving at its conclusion that there was jurisdiction in the bankruptcy court relied wholly upon the language of the statute giving the bankruptcy court jurisdiction in *suits by trustees*. The case at bar is clearly distinguishable. There has been no adjudication, and no trustee has been appointed. No trustee or receiver has gone into possession, taken or claimed the property in dispute.

There is also a vast distinction otherwise between the facts in the Page case and the case at bar. The Page case did not involve a suit between two third parties but it involved a controversy between a trustee and a third party. The third party in the Page case did not raise the question of jurisdiction. There the trustee had actual custody of the property in question. In the case at bar there is no trustee and the receiver is claiming no interest whatsoever in the Forty-eight Thousand ($48,000) Dollars and the court has not actual or any possession of that fund.

Paragraph 23 of the Bankruptcy Act specifically gives a court of bankruptcy jurisdiction in a suit by a trustee provided defendant consents thereto. In the case at bar, had there been an adjudication and a trustee appointed, jurisdiction might conceivably have been conferred by consent of the parties. However, the act does not so apply to a receiver, and there was no trustee in our case.

This court has on numerous occasions defined the power of a bankruptcy receiver prior to adjudication, as a mere caretaker. His authority is strictly limited by the Bankruptcy Act and should not, and can not, be extended by construction.

It seems if Congress had intended to vest the bankruptcy court with jurisdiction to settle disputes between receivers and third parties upon mere consent, it would have said so. In the case at bar dispute is not even between receiver and third parties but between third parties and third parties.

In the Page case there is cited to support its theory, *Murphy* v. *John Hofman Company*, 211 U. S. 562, but the court does not fully quote the language there.

The language in that decision states that where

property in dispute is in **actual possession of the court of bankruptcy** there comes into play another principal not peculiar to courts of bankruptcy but applicable to all courts, Federal or State.

> "* * * Where a court of competent jurisdiction has taken property into its possession, **through its officers**, the property is thereby withdrawn from the jurisdiction of all other courts. The court having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them. * * *" (Page 569.)

Where property is in the actual possession of the court, the court of course has jurisdiction over that particular property, other courts can not take jurisdiction for want of such actual possession. In the case at bar, there is no dispute between different courts as there was in the Murphy case. This Murphy case is merely authority that possession of property by a bankruptcy court can not be disturbed by the process of another court.

May we respectfully request this court to again read the Nixon case (38 Fed. (2d) 420, 423), cited by appellants, which covers the facts in case at bar and holds jurisdiction can not be conferred by consent of the parties. This case is extensively cited on the points involved here by many of the Circuits and text books.

The property in dispute in the case at bar was not in the actual possession of the court of bankruptcy

as it was in the Murphy case. The funds were not deposited in the court, the receiver did not have or claim possession of the funds in dispute, no trustee for the court had possession of the funds, the referee did not have the funds in his possession, the marshal of the court did not have them in his possession but they were held by three separate individuals as Escrowees; Craig swore in his answer that he was not agent for the bankrupt; Harris and Odell, the other two escrowees, maintain they were not agents for the bankrupt. The bank, in its answer, reserved the right to object to any disbursement of funds except as provided for in the letter of authority (Rec. 46-7). Can it be contended that the court had in this bankruptcy matter any possession or right to these funds which were in escrow for the State and the appellees pending the outcome of the litigation? The appellees in their petition set forth that the alleged bankrupt was in no way interested in these Forty-eight Thousand Dollars of funds. Certainly the record reveals that the possession is hostile and adverse to the court, at least as far as the contesting parties, Harris, Odell and the Bank are concerned.

If the court had possession of the funds, why did it not order the bank to pay them irrespective of Craig, Harris and Odell, the escrowees? Of course the court could not do this and did not do this because it did not have possession of the funds.

The Court misconstrued the law and the facts in intimating that the funds were in the possession of the bankruptcy court. In order to be *custodia legis,* the rule is well settled, property must be in the possession of an officer of the court or must be deposited in court.

Possession becomes material only when there is a dispute between a trustee and an adverse claimant, over the *estate of the bankrupt*. The Bankruptcy Act grants jurisdiction as follows:

> "(7) Cause the estate of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as otherwise provided." U. S. Code, Title XI, Chap. II, Sec. XI.

Clearly the jurisdiction relates to estates of bankrupts, and jurisdiction to determine controversies must relate to the *estates of the bankrupt*.

This section has two requirements: First the controversy must relate to the estate, and second, there must be a bankrupt—*i. e.*, there must be an adjudication. In the case at bar, neither element was present. The controversy does not relate to the estate of the bankrupt, because the $48,500.00 is not and never has been claimed by the bankrupt, or the receiver. Second there was no bankrupt—there had been no adjudication.

In any event there is no possession of the fund in controversy in the bankruptcy court. This fact can not be disputed. The funds are in the National Builder Bank,—not in court. The bank has filed what might be termed a special and limited answer (Rec. 46) reserving rights to object to any distribution of funds other than by the agreement of deposit. The alleged bankrupt does not have them in its possession. The court's officers do not have possession of them.

The court no doubt inadvertently overlooked the answer filed by William L. O'Connell, the receiver, on June third, after the so-called agreed order which reads in part as follows:

> "Wherefore, this respondent prays that an order may be entered herein, restraining and en-

joining the petitioners, and each of them, their attorneys and agents, the National Builders Bank of Chicago, its employees, agents, and attorneys, Benjamin F. J. Odell, R. G. Harris, Ruth V. Wilner, P. M. Weaver, E. M. Craig, and R. D. Steel, or any of them, from paying out, disbursing, or otherwise disposing of the sum of Twenty Thousand and no/100ths Dollars ($20,000.00) of said moneys now on deposit with the National Builders Bank of Chicago, in said Sales Tax Escrow Fund, until an adjudication of the alleged Bankrupt is had in this proceedings, or until the further order of this court." (Rec. 53.)

There has been no hearing whatever upon this answer. If the Court had possession of any of the funds, it would have been unnecessary for the receiver to ask for a restraining order. Clearly the Court's own officer did not consider that he had any control or custody of the funds. It should be noted that the only relief asked for by the receiver was a restraint upon the disbursing, not of the $72,000.00, but only of the $20,000.00.

The courts have often held that a receiver can not maintain a summary proceeding for the recovery of property. A receiver may protect his possession of property until there is an adjudication, but he can not maintain suits.

The court has completely overlooked the fact that at the time of the entry of the orders appealed from, there had been no adjudication of the Tax Service Association as a bankrupt.

One of the defenses raised by the answer of the alleged bankrupt was that the court was utterly without jurisdiction over the subject matter of the entire bankruptcy proceeding, because the Tax Service Association was not a "moneyed, business or commercial

corporation" within the purview of the bankruptcy act. If this defense be sustained the entire proceeding including the controversy relating to the Escrow fund must in law be considered a nullity.

The court overlooked the fact that the bankruptcy petition might be dismissed. In such a case the controversy will have to be litigated twice, involving double expense, costs and delay.

Appellants Were Not Agents of Bankrupt.

This court concludes that while the record does not show it, the circumstances warrant the contention that appellants were agents of the alleged bankrupt. This court has undoubtedly overlooked some very pertinent facts in this respect. Odell was engaged by the appellees themselves, the contractors. The contract between the Tax Service Association and the several trade associations was not the contract of engagement of Odell by the appellees. Appellees were not parties to that contract.

As an attorney, Odell's obligation was to his clients, the contractors, for whom he instituted the suit. He did not institute a suit for the alleged bankrupt; he did not institute a suit for the trade associations with whom the alleged bankrupt contracted. His relations as an attorney were distinctly with his clients, the contractors, appellees here. Indeed, as an attorney, his obligation could not be to anyone else than his clients. It would have been inconsistent, if not impossible, for him to have had an agency with anyone else than his clients for whom he was conducting the litigation. The very word "attorney" means agent. Appellees' petition itself says Odell was notified by appellees to cease acting as their agent (Rec. 31-32).

This definitely establishes the agency of Odell for his clients, appellees, and for no one else.

The escrow fund was definitely in control of three parties, none of whom were the alleged bankrupt. The escrow fund was not opened under the direction of the alleged bankrupt as this court has assumed. None of the alleged bankrupt's officers or agents could disburse the funds. Indeed, the letter (Rec. 27) to the bank concerning the funds dispels any theory of agency control or possession by the alleged bankrupt. This escrow, like other escrows, was established for protection. In this case to protect the State of Illinois, pending the outcome of the litigation.

Appellants' Right to Answer Not Waived.

On page 3 of its opinion this court states:

> "• • • While appellants contend they have never been given an opportunity to answer the petition as to its merits and have never had a hearing upon the same, the order of the court entered June 29, 1937, recites: 'The court thereupon directed said Benjamin F. J. Odell, R. G. Harris and the Tax Service Association of Illinois, and each of them, to answer said petition, and each of them thereupon stated that they did not desire to answer said petition,' and further recites that they desire to stand upon the jurisdictional question theretofore raised. • • •"

It is respectfully drawn to this court's attention that it has long been the established law and custom of the courts to first determine jurisdictional questions. Appellants, unless they desired to waive their jurisdictional contentions, could not at the same time answer to the merits. In that respect did the trial court have authority to order appellants to answer the petition as to its merits? The court actually never

ordered the appellants to answer to the merits. This matter is dealt with in appellants' brief (page 25), wherein it is pointed out that the order with this erroneous language was surreptitiously presented by Attorney David in the absence of other counsel. The error in that order and the misconstruction given it were pointed out to the court by appellants in their exceptions to the Master's report (Rec. 92). Where an alleged waiver of the right to answer is disputed should not the answer be permitted, particularly where the alleged waiver is secreted in a blind order? We believe it is the duty of all courts when error is revealed to give defendants all possible latitude in answering, that equity and justice may be further promoted.

This court may have overlooked that the appeal in this case was from an order overruling appellants' exceptions to the referee's report (Rec. 98). Apparently this court has not ruled on that part of our appeal.

This court has overlooked the fact that the trial court arbitrarily denied appellants' request duly made for leave to answer to the merits (Rec. 96). Exception was duly taken thereto and an appeal prayed thereon.

In this court's statement of facts no reference whatever is made to that order appealed from, and which is as follows:

> "This day comes Benjamin F. J. Odell and Roy G. Harris by their attorneys and enter their motion for leave to file second amended supplemental answer to the petition of Dahl-Stedman, *et al., which motion is denied,* to which ruling of the court Benjamin F. J. Odell and Roy G. Harris *duly except.*" (Rec. 96.)

In its opinion (page 5) this court further states:

> "Appellants do not state, but intimate they have some interest in the funds in question. If so, they should have asserted such claim."

After the motion to strike of Roy G. Harris and special answer of Benjamin F. J. Odell to strike were decided against them on the sole question of jurisdiction, appellants did make strenuous efforts to assert their claims by answer to the merits, but the court denied them that right and the ruling was duly excepted to.

The situation with respect to the Dahl-Stedman petition was this:

June 29	Dahl-Stedman petition filed.
June 29	Motion to strike of Harris and Special Answer of Benjamin F. J. Odell referred to Referee Sullivan on jurisdictional question.
July 12	Motion for leave to answer to merits denied.
July 12	Order entered on merits of Dahl-Stedman petition approving Referee's report.

The Court misconstrued the so-called "Special Answer of Odell" (Rec. 54). The prayer of that answer asked "that the petition heretofore filed be stricken". The legal effect was simply a motion to dismiss. The petitions of Harris and Tax Service Association to strike the Avery Brundage petition (Rec. 55-56) were also motions to strike and did not purport to be answers.

Appellants have a right by statute and rules of court to move to dismiss a petition prior to filing any answer.

> "* * * If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, *and, if it be denied, answer shall be filed within five days thereafter or a decree pro confesso entered.*"
>
> Rule 29 for Courts of Equity of the United States.

Here the court denied the appellants the right to file an answer after motions to strike were overruled.

This appeal is from the order denying leave to file an answer.

Appellants now stand before this court asking leave to be heard on the merits. Denial of such leave means not only a deprivation to appellants of their day in court, but it opens the way for an extensive personal liability to them in paying $48,000 otherwise than in the manner contracted and deprives them of their common law, statutory and constitutional rights.

This court has seen fit to remark on page 4 of its opinion that on July 13th appellants were directed to answer, showing what interest or claim they had in the remaining $20,000 of the escrow fund; this court then continues, no such answer has been filed. Had appellants answered, appellees could well have contended the jurisdictional question was waived. Appellants were therefore compelled to be consistent and adhere to their jurisdictional complaint. Their answers, therefore, to the $20,000 were likewise to the jurisdiction of the court. The court has also overlooked the fact that an appeal was taken from this order and no answer was necessary in the lower court in the interim.

Appellants Have An Interest in the Funds.

Appellants heretofore have refrained from discussing their interest in the funds but this court has commented upon their failure to state that interest. Therefore, to clarify and remove any confusion it is submitted what the answer of appellants would have revealed had appellants been allowed to file it.

First. The answer would show appellant Odell has a lien on the funds for the payment of his attorney's fees for various contracts of engagement of his services. That appellees' petition merely reveals engage-

ment of appellant Odell, by the agreement of the associations and subsequent agreement by a few of the contractors (Rec. 25). That there were several forms of agreements engaging appellant Odell and he is entitled to have the court pass upon all of them, and not merely the forms appellees have chosen and submitted.

Second. The answer would show appellant Odell had served notice of attorney's lien whereby he is protected by law as to all interest he may have in the funds.

Third. The answer would show the contract between the Tax Service Association and the Employers Associations was not the contract under which appellant Odell litigated for the appellees.

Fourth. The answer would show appellant Odell is entitled to compensation on a *quantum meruit* or a *quantum valebat* for the services he rendered appellees.

Fifth. The answer would show a definite deception was practiced upon appellants to procure their signature to the order of May 27th.

Sixth. The answer would show appellees hired appellant Odell by written contract not shown in the record, independent of contract between trade associations and the alleged bankrupt, and he is entitled to the wage of his hire.

Seventh. The answer would show there was an acceptance of the services of appellant Odell and there was an express agreement to pay him.

Eighth. The answer of appellants will show that an injunction was issued by Judge Stanton of the Superior Court of Cook County in case No. 37 S 1716 enjoining appellants from disbursing the said funds in escrow and said injunction is still in force and effect.

That on May 12, 1937, a restraining order of the United States District Court in this case was entered in effect preventing the dissolution of the said injunction in the State court and it is still in full force and effect. That appellants would be violating said injunctions should they now disburse said funds.

Ninth. The answer would show no provision was made for indemnification to appellants for payment of funds otherwise than under their agreement to disburse them.

Tenth. That the answer would state facts to show that jurisdiction was not conferred on the court by consent of the parties.

Eleventh. That the answer would show it is believed the petitions were filed without authority of the alleged appellees and without knowledge of some of them.

Twelfth: That the answer would show that the tax litigation was eminently successful.

Successful Contractors' Suit.

This court has said in its opinion that appellant Odell was unsuccessful in the contractors' suit in the Illinois Supreme Court.

The court failed to notice that the sworn answer of the receiver for the alleged bankrupt (Rec. 51) sets forth the success of appellant Odell in the Blome case. No hearing has been had on the answer of the Receiver. The court also overlooked denial to appellants of right to answer on the merits. (Rec. 96.) No answer or hearing on the merits has been allowed these appellants, yet this court has erroneously decided that the appellant Odell was unsuccessful in the contractors' litigation.

The court's attention is drawn to just what happened in that case in the Illinois courts so there will be no confusion on those facts. At the time appellant Odell was engaged by the contractors to intercede for them with the Department of Finance that Department was erroneously construing the Retailers' Occupation Tax Act by their ruling that contractors should pay the tax on both their labor and materials unless the contractors complied with arbitrary requirements commercially impracticable if not impossible. After the Department's refusal to change this ruling Odell was then engaged to file suit for the contractors. The Circuit Court of Cook County by decree also upheld that rule. The Supreme Court of Illinois in February, 1937, on appeal, held that the tax could not be computed against the contractor on both labor and material used in building and construction, and that the Department of Finance could compute the tax only on the price of materials furnished. The Supreme Court of Illinois thereby reversed the decree of the Circuit Court of Cook County and upheld appellant Odell's contention and remanded the cause for further proceeding:

> "When sales to the owners are of fabricated materials or equipment, the department may compute the tax on the price of such materials so fabricated, but when materials are furnished to be used to erect or repair a structure, the service involved in such erection or repair does not constitute tangible personal property, or the sale thereof.
>
> The decree of the trial court is erroneous and is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.
>
> Reversed and remanded."

Blome v. *Ames*, 365 Ill. 456.

The Department of Finance was accordingly compelled to change its contested rule. The sworn petition of

the receiver herein is correct therefore (Rec. 51), in the recitation of the facts that the decision was favorable to the contractors as a result of Odell's efforts.

Thus the contractors became exempt from tax on their labor, the major portion of construction costs.

The contractors, at the direction of their attorney, appellant Odell, pending the litigation had put in escrow only the estimated tax on materials (not on labor). There was no escrow made of taxes on labor. Had the contentions of the Department prevailed the contractors would have been liable for tax on labor as well as materials (the $314,000 in escrow and the additional tax not in escrow to be calculated on their labor. Perhaps an additional $600,000).

As to the tax on the materials (the $314,000 in escrow) the Department required payment of approximately only seventy-five per cent leaving a saving to the contractors of approximately twenty-five per cent of the tax on their materials in addition to unqualified exemption of tax on their labor.

In December, 1937 the Supreme Court of Illinois voluntarily, of its own accord, modified its prior limited decision in the said Blome case and held that material as well as labor was exempt from the tax. That court used these words:

> "• • • The *Blome case* involved 'contractors who agreed to furnish and install building materials and fixtures, to do excavating, make foundations erect buildings, and make various kinds of repairs to buildings already built.' It is directly in point here. We have reconsidered in this opinion the reasoning upon which part of that decision rests and no longer feel impelled to follow it. So far as that case applies to construction contractors who furnish labor and materials in excavating for basements, sewers, water mains or other purposes,

> or in the erection of foundations or buildings, or in the making of various kinds of structural repairs to buildings, the *Blome case* is expressly overruled."

This language is taken from the case of *Herlihy* v. *Nudelman*, 367 Ill. 600, 605, which was a public construction case for the Sanitary District and did not involve private construction. The Department of Finance accordingly then made a second revision of its rule, exempting contractors in all construction, private and public, from tax on materials (as well as labor). As it now stands every contractor, every plaintiff in the Blome case, is now entitled, as a result of appellant Odell's efforts, to the return of the seventy-five per cent paid by them to the State as a tax on materials as well as a refund from the State on all other sales taxes paid by them on materials. In addition to this, these plaintiffs, as contractors, are now and hereafter exempt from the tax. The said $314,000 therefore dwindles into insignificance in comparison to the gross savings by contractors which it is estimated will run into millions.

Therefore, the facts are that appellant Odell won a very substantial victory for the contractors or appellees here in procuring their exemption from the Retailers' Occupation Tax Act of the State of Illinois.

CONCLUSION.

This court in its opinion arrived at certain conclusions of fact which might be cited as *res. judicata.*

Does this court thereby decide that Appellant Odell is precluded from recovering sales tax litigation fees against some of the Appellees on separate contracts not in issue here, when Odell was denied right to answer?

Does this court intend by its opinion, without a court hearing, to determine that nothing is due to the alleged bankrupt?

Does this court intend by its opinion to prevent Appellant Odell from litigating in other courts his right to fees?

Does this court conclude that no one is obligated to pay legal expenses for the contractors' litigation?

It is urgently requested that a petition for rehearing be granted appellants herein to the end that the District Court may be held to have been without jurisdiction to entertain the petitions filed by Appellees; that Appellants may be held to have been erroneously deprived of their right to answer said petition on the merits, that the orders of the District Court be reversed and such other and further relief be granted as is consistent with equity and justice.

Respectfully submitted,

KENART M. RAHN,
Counsel for Appellants.

UNITED STATES OF AMERICA,
STATE OF ILLINOIS,
COUNTY OF COOK. } ss.

I, Kenart M. Rahn, Counsel for the above named Appellants, do hereby certify that the foregoing petition for re-hearing is presented in good faith and not for delay.

KENART M. RAHN,
Counsel for Appellants.

Endorsed: Filed March 29, 1938. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the thirtieth day of March, 1938, there was filed in the office of the Clerk of this Court, Suggestions in Opposition to Petition for allowance of Costs, Interest and Damages, which said Suggestions are in the words and figures following, to-wit:

No. 6355

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

In the Matter of
Tax Service Association of Illinois,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
Appellants,
vs.
Avery Brundage Company, *et al.*, and Dahl-Stedman Co., *et al.*,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

SUGGESTIONS OF APPELLANTS IN OPPOSITION TO APPELLEES' PETITION FOR ALLOWANCE OF COSTS, INTEREST AND DAMAGES.

These respondents respectfully advise the court that they have filed a petition for rehearing of this cause within the time allowed by law and said petition is as yet undisposed of by this court.

The appeal in this case was filed in all sincerity, was not frivolous nor taken for delay. On August 11, 1937, Petition for Leave to Appeal was filed in this court. Appellees in opposition thereto contended the appeal was frivolous and prosecuted for delay. This court then upon consideration of respective briefs and points made therein concluded there was sufficient merit to warrant the appeal and it was accordingly

allowed September 11, 1937. The record in the case was promptly prepared and abstract and brief filed with due diligence. Within less than sixty days after the filing of briefs this court rendered its decision, notwithstanding the Seventh Circuit is burdened with fifty per cent more litigation than any of the other Circuits. Appellees can hardly be heard to complain they have suffered by any delay.

The case presented some unusual and heretofore undecided questions of law. Some of the questions raised were whether or not third disinterested parties can use a bankruptcy court to litigate their contentions; whether or not a bankruptcy court has power to dispose of property, not part of the bankruptcy estate, prior to adjudication; whether equity rule sixty-six and bankruptcy rule fourteen are binding upon the District Court itself as well as on the litigants therein; whether or not a litigant can be deprived of a right to answer to the merits because he has first raised a jurisdictional question,—all vital questions heretofore undecided in this Circuit.

The court itself has intimated in its opinion the case presented some troublesome and doubtful phases.

The appellants were, as escrow officers, trustees of the funds entrusted to their care. Their office was that of a fiduciary; their duties and liabilities were to all of the 368 depositors. Three of these claimed to represent a group of the depositors and made demands for moneys in the trust fund. As trustees it was and is the duty of appellants to have determined, First, the validity of the self-asserted claims of the three; Second, the amounts due to all the claimants including the State of Illinois.

Pending the determination of the amount due the State of Illinois, the said three depositors filed a petition in the bankruptcy court and thereby imposed upon the trustees, appellants, a positive duty to protect the trust estate. In the performance of that duty these appellants, trustees, engaged counsel to represent them as trustees of said funds. The funds then awaiting distribution (had the litigation not been so started by appellees) were not and had not been drawing interest for two years. There was no agreement to pay interest. Shortly after the litigation was started by appellees, on to-wit, July 12, 1937, appellants in open court, before his Honor Judge Phillip Sullivan, offered to put the money into Federal securities which would earn interest. Appellees did not concur therein. Again in this court on to-wit, October 13,

1937, appellants suggested, in their pleadings, that the funds be invested in Federal securities. Again appellees did not assent. Fiduciary funds do not by law draw interest. Appellants did not institute the litigation that is preventing the distribution of these funds. There was no necessity to file petition in the Bankruptcy Court, especially when the State Court already had jurisdiction of the entire matter.

The order appealed from directed appellants to sign a check to others than their fiduciary contract obligation required, and was not a money judgment. The order provided:

> "That Benjamin F. J. Odell, R. G. Harris and E. M. Craig, and each of them, sign instanter a joint check for Forty-eight Thousand Five Hundred Eighty Dollars and Forty Cents ($48,580.40) payable to the order of George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee * * *" (Rec. 98)

The order merely directed the signing of the check. It did not require appellants to pay any money. In such cases interest is not properly allowable. In case at bar the order was not to pay money but to do a physical act,—to sign a check to three persons who wanted to make distribution themselves of the funds.

Under neither the Illinois Statutes nor rules of this court is there provision for payment of interest on such orders or under such circumstances, to-wit, the performance of a physical act.

Appellants were and still are enjoined from distribution of the funds by order of Judge Stanton of the Superior Court of Cook County in case No. 37 S 1716. On May 12, 1937, a restraining order of the United States District Court in this case was entered in effect preventing the dissolution of the said injunction in the State court and that injunction is still in force and effect despite numerous attempts by the alleged bankrupt to dissolve the same.

By virtue of contracts of hire, not set out in the petition, appellant Odell has an attorney's lien upon the funds for services he has rendered appellees and for which services he has not been paid. An example of such contracts is as follows:

> "On the recommendation of The Builders Association, we hereby consent to the employment of Benj. F. J. Odell as our attorney to represent us in negotiations and litigation in an effort to change the present ruling of the Retailers' Occupation Tax Act as it applies to us, the expense in no event to exceed three months' savings of

such taxes, payment of our share of the expenses to be made with the approval of The Builders Association under their agreement with said Odell as to a gross maximum fee. The above is subject to Bulletins issued by Mr. Craig dated April 17th and 23rd, 1935.

Dahl-Stedman Co.
Geo. V. Dahl
(Seal) *As President*

Dahl-Stedman Co.
Elmore W. Stedman
As Sec'y & Treas.

April 25, 1935."

There are 368 contractors interested in the escrow fund. A substantial number thereof have relatively small sums due them ranging from ten cents to Fifty Dollars each. It appears that many may be financially irresponsible and perhaps not readily able to respond to payment of the compensation due from them to appellant Odell otherwise than out of said funds.

The action of the Special Committee has compelled the trustees in the due performance of their fiduciary relation to incur expenses in this litigation, through no fault of theirs and which expenses should be distributed proportionately to all the contractors and not be borne by a few or by the said trustees. It is the positive duty of a trustee to protect the trust estate. The trustees acted, and were required to act, for all of the contractors and not merely for those whom the committee claims to represent.

"As a general rule, the costs and expenses incurred by the trustee in necessary and proper litigation carried on by him as the representative of, and relative to, the trust, are payable out of the trust estate, and not by the trustee personally. Accordingly, a trustee who acts in good faith is entitled to have paid out of the trust estate costs and expenses incurred by him, in a proceeding by him to collect the assets and claims due the estate, including the foreclosure of mortgages; in a proceeding to obtain the advice and direction of the court; and in the defense of actions against the estate, and also costs and expenses on appeal, unless the appeal is unnecessary or not in the interests of the trust estate. In the light of this rule, judgments and orders imposing costs on trustees are held to charge them in their official, instead of

their individual capacity, unless a contrary intention appears. * * *"

65 Corpus Juris page 723-724, Sec. 586

"Ordinarily, where the litigation involves the protection and preservation of the whole trust estate, the costs and expenses incurred by the trustee in prosecuting or defending the litigation are chargeable to the capital or principal of the estate; * * *"

65 Corpus Juris page 727, Sec. 590

"* * * Perilous, indeed, would be the position of a trustee if the law required him to protect and guard the trust fund in expensive and long protracted litigation at his own expense, and, besides, to be held liable for every unavoidable loss from a decrease in value of the trust property, or otherwise."

Nevitt v. *Woodburn*, 190 Ill. 283, 298.

Attorneys fees, costs and other expenses of the trustees are proper charges against the fund and should be deducted before distribution.

The authorities submitted by appellees are inapplicable to this case.

In cases appellees cite the courts specifically found the appeals were frivolous. None of them involved discretionary appeals but involved appeals as a matter of right. All of them involved judgments or decrees for the payment of money. In case at bar execution could not issue and draw interest on a judgment. In none of appellees' cases was there conflicting orders of the courts, such as State Court injunction in case at bar. In none of appellees' cases were there offers to deposit the funds in court. In case at bar one appellant has an attorney's lien on the funds. Appellants should not be penalized for performing fiduciary duties imposed on them by law.

This case has not been appealed for delay; appellants have faithfully performed their duties; meritorious questions having been presented by the appeal; therefore, costs, interest and damages should not be assessed against appellants.

Respectfully submitted,

Roy G. Harris,
Benjamin F. J. Odell,
By Kenart M. Rahn,
Their Attorney.

Kenart M. Rahn,
Attorney for Appellants.

State of Illinois }
County of Cook } ss.

Kenart M. Rahn being first duly sworn on oath says that he is conversant with the above and foregoing answer, knows the contents thereof and that the matters and things therein stated are true to the best of his knowledge and belief except those things on information and belief and as to them he believes it to be true.

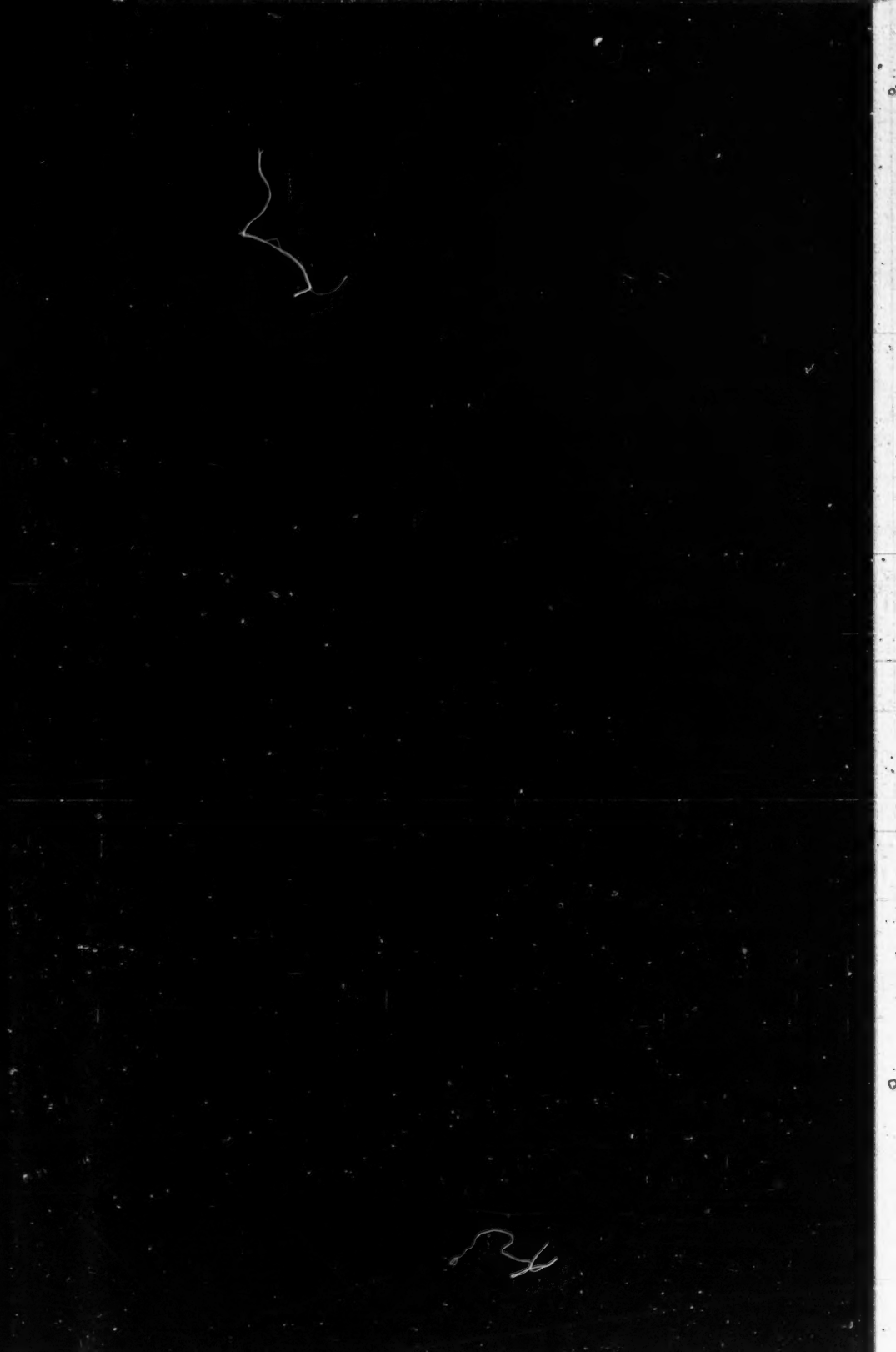
Kenart M. Rahn.

Subscribed and sworn to before me this 30th day of March, A. D. 1938.

Ruth V. Willner,
Notary Public.

Endorsed: Filed March 30, 1938. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the fifth day of April, 1938, there was filed in the office of the Clerk of this Court, Appellees Answer to Petition for Rehearing, which said Answer is in the words and figures following, to-wit:



IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

No. 6355

In Re TAX SERVICE ASSOCIATION OF ILLINOIS, Alleged Bankrupt.	Appeal from certain orders of the District Court entered on petition of Dahl-Seedman Co., et al., petitioners-appellees, vs. Benj. F. J. Odell and Roy G. Harris, respondents-appellants. Hon. Phillip L. Sullivan, District Judge.

APPELLEES' ANSWER TO PETITION FOR REHEARING.

May it please the Court:

Appellants' petition for rehearing is merely a reargument of the issues thoroughly argued in the briefs and decided by this Court, together with a statement of new matter totally extraneous to the record.

Appellants say that this Court failed to appreciate that there was no disposition of the case below on the merits and, therefore, findings of various facts are unwarranted. Appellants' statement is refuted by the record. The order of May 27, 1937, made findings of fact which were agreed to by all the parties. The Court also made findings of fact in the order of July 12, 1937, after report of the

Special Master, and these findings were based upon the sworn averments of appellees which were not denied.

Appellants say (p. 2):

> "The Court overlooked the fact that neither Appellants nor Appellees were parties to the bankruptcy proceeding."

The inaccuracy of appellants' statement is easily determined. This Court did not overlook the question. It passed directly and squarely upon it, saying:

> "The essential question presented by the appeal is whether the court had jurisdiction to disburse the controverted fund. It is the contention of appellants that neither they nor appellees were parties to the bankruptcy proceeding and that the controversy, therefore, is one between two third parties having no connection with the alleged bankrupt or its affairs."

Jurisdiction.

Appellants claim that this Court decided that the District Court had jurisdiction because of the consent of the parties; that in doing so this Court depended upon the case of *Page* v. *Arkansas Natural Gas Corporation*, 53 F. (2d) 27; and that said case is confusing.

The facts are to the contrary. This Court decided, in accordance with the law and the numerous cases cited under Point I of Brief for Appellees (p. 15), that the District Court had jurisdiction because a bankruptcy court has full and complete jurisdiction over property in the possession, control or custody of a bankrupt or of a bankrupt's agent. This Court said:

> "It seems to us, even though it has been finally determined that the bankrupt had no interest in the escrow fund, that the same was so closely connected with its affairs in that it was controlled and in the custody of its officers and agents, that the court properly acquired jurisdiction of the fund."

This was the basis of this Court's decision. This Court then added:

> "If we be wrong in this view, however, the agreed order of May 27, 1937, expressly conferred jurisdiction."

However, there is nothing confusing about the *Page* case. In that case the Supreme Court rendered a short opinion and did not repeat all of the language of the Circuit Court of Appeals; but almost the identical language of the Circuit Court of Appeals in the *Page* case quoted in this Court's opinion in the instant case has been used by the U. S. Supreme Court and other courts in numerous cases. See quotation from

In re Kerr, 5 F. Supp. 899,

on page 23 of Appellees' Brief, and cases therein cited, including

Taubel-Scott Kitzmiller Co. v. *Fox*, 264 U. S. 426; 68 L. Ed. 770, 774.

Appellants' strange process of reasoning amounts to this: this Court's conclusion on the question of jurisdiction was incorrect because it quoted from the opinion of the Circuit Court of Appeals in the *Page* case and the Supreme Court affirmed the *Page* decision but used different language. Ergo? Appellants conveniently ignore all of the cases on jurisdiction and consent cited under Points I and II of Appellees' Brief.

Appellants intimate, although they do not directly say, that the fact that there had been no adjudication of the bankrupt deprived the Court of jurisdiction over the Escrow Fund. It is significant that they cite no case and have never cited one to sustain this intimation. We repeat, as we have said before, that the jurisdiction of the bankruptcy court over property in its possession is not determined or affected by whether there has or has not

been an adjudication of the bankrupt. If that were not the law, a court in bankruptcy before adjudication would have no right or jurisdiction to order property in the possession of the bankrupt or the bankrupt's agent turned over to the receiver, would have no right to order its receiver to take appropriate action to protect and collect the bankrupt's property, and would have no right to entertain a petition for reclamation by a third party who claims that its property is in the possession of the bankrupt or the bankrupt's agent, etc. All these things a bankruptcy court has the jurisdiction and right to do before adjudication of the bankrupt; and there is no case in the books which holds or intimates to the contrary.

In this connection, it may be of interest to this Court to know that on March 24, 1938, Referee William L. Sullivan, as Special Master, filed his report recommending that an order of adjudication be entered against the alleged bankrupt. In view of the fact that appellants in their petition for rehearing (p. 8) mention the defense of the alleged bankrupt to the petition in bankruptcy that it was not a "moneyed business or commercial corporation," it is interesting to note what the Special Master says concerning this defense. He says:

> "There can be little doubt, in my opinion, that the purpose of the organizers and managers of the Association (Tax Service Association) was at all times their own financial gain. One would have to be credulous, indeed, to believe that the object of those who organized this Association or who successively had the management of its affairs, or the taxpayers who joined it, was anything other than financial benefit to themselves. Certainly, there was nothing eleemosynary in or about the Tax Service Association of Illinois, the alleged bankrupt. It conducted a business pure and simple. * * * About the only 'not for pecuniary profit' feature of the Association was its 'not for pecuniary profit' charter."

Appellants having found a case which talks about actual possession of the Court, use a page of their petition to claim that the District Court in this case did not have actual possession. They use many words to make a straw man in order to knock him down. Suppose the Court did not have actual possession; in any event it had constructive possession, which was amply sufficient to give it jurisdiction to dispose of the Fund.

But, appellants say (p. 6):

> "The court misconstrued the law and the facts in intimating that the funds were in the possession of the bankruptcy court. In order to be in *custodia legis*, the rule is well settled, property must be in the possession of an officer of the court or must be deposited in court."

We submit that this statement is brazen effrontery. It charges this Court with a misconstruction of the law. Its sole proof of that charge is appellants' statement of the law which cites no case to support it and ignores all of the cases cited in Appellees' Brief under Point I (p. 15). The rule of law is, as stated in all those cases, that:

> "So far as concerns jurisdiction over property, the actual or constructive possession, after the filing of bankruptcy petition, by the bankruptcy receiver, trustee, marshal, or referee, or by the *bankrupt or his agents*, or by someone not claiming beneficial interest * * * constitutes *'custodia legis'* for the purpose of assumption of jurisdiction" by the bankruptcy court."

On page 7 of their petition for rehearing appellants also claim that a bankruptcy court has jurisdiction only over controversies relating to the property of a bankrupt and that there is no bankrupt until there is an adjudication. Both of appellants' assertions are clearly erroneous. In order to sustain the first, they quote one out of twenty grounds of jurisdiction specified in the stat-

ute, ignoring the other nineteen. If a bankruptcy court has jurisdiction only over property of the bankrupt, then it would have no jurisdiction to order property in the possession of a bankrupt or its receiver or trustee or agent returned to its owner. As we said before, no decision has held that a court of bankruptcy lacks jurisdiction over a controversy until after adjudication. To the contrary see:

Central Republic Bank & Trust Co., et al. v. *Caldwell, et al.*, (C. C. A. 8th Cir., 1932) 59 F. (2d) 721.

In re J. C. Winship Co., (C. C. A. 7th Cir., 1903) 120 F. 93, 96.

Appellants say (p. 7) that this Court no doubt inadvertently overlooked the answer filed by the receiver, in which he asked for a restraining order on all the parties. Appellants say if the Court had possession of any of the funds it would have been unnecessary for the receiver to have asked for a restraining order. The receiver did ask for such an order as to $20,000, but no order was ever entered on his request. Is the receiver's request *proof* that the Court did not have possession of the fund? In fact, however, the receiver actually did claim that the Court had jurisdiction of the entire fund. He said in his answer (Tr. 50):

> "By reason of the filing of the petition herein by petitioners, that portion of said fund now on deposit with the National Builders Bank of Chicago, in said Sales Tax Escrow Fund, which was furnished by petitioners, is subject to the jurisdiction and order of this Court."

The portion of the fund to which the receiver referred is $68,580.40, namely: the $48,580.40 in controversy in this appeal and the $20,000 which was reserved for future determination.

Appellants the Agents of the Bankrupt.

This Court said in its opinion:

> "It is claimed they (appellants) were in custody and control of the escrow fund as the agents of appellees, while appellees contend they were acting on behalf of the alleged bankrupt. While it may be said the record does not expressly so show, yet the circumstances are such that the latter contention must be accepted. The escrow provision was a part of the agreement between appellees and the alleged bankrupt. The bankrupt, under the agreement, was to employ Odell to conduct the litigation regarding the validity of the tax. For that purpose, under the agreement, he plainly was the agent of the bankrupt. Harris was Vice President of the bankrupt and the money in question was collected by it and deposited in an account which was opened under their direction."

In their petition for rehearing appellants endeavor to show, by making the identical arguments they made in their main and reply briefs, that this Court, in making the above statement, overlooked some pertinent facts. However, appellants now make one new point, namely:—that appellees were not parties to the contract of April 9, 1935.

This is, indeed, a surprising assertion. If it were true, then appellants and the Tax Service Association were all guilty of fraud. The contract of April 9, 1935, provides (Tr. 23) that the Tax Service Association agrees to expend its efforts to persuade the Department of Finance of Illinois to change its present rulings concerning the application of the Illinois Retailers' Occupation Tax Act to said subscribers, and to retain on behalf of the subscribers and for them, but without expense to them, Attorney Odell, and, in the event of a favorable ruling after proceedings have been instituted in the State Court holding said subscribers exempt from said tax, the Tax Service

Association was to receive an additional sum equivalent to the calculated net savings to each subscriber for 3 months preceding the saving, but not to exceed $20,000. Odell consented to retention under the terms of this agreement. It is apparent that the trade associations who signed the contract were acting for their members. The trade associations themselves (not being engaged in any business) were not subject to any Retailers' Occupation Tax. There could be no saving to them of any tax. Therefore, if what Odell and the bankrupt agreed to do, for which the bankrupt was paid $1500 and was to be paid a contingent fee of $20,000, was to have declared exempt from the tax the trade associations which had never been considered subject to the tax, Odell, Harris and the bankrupt were guilty of plain, unadulterated fraud.

It is elementary law that a person for whose benefit a contract is made may be a party thereto. Appellants' contention (now made for the first time) that the contract of April 9th was not a contract between appellees and the bankrupt, but one between the trade associations and the bankrupt is so far-fetched that it serves well to emphasize and confirm appellees' contention that appellants' appeal here is frivolous and was taken purely for the purposes of delay, and that, therefore, (as appellees have prayed in their petition filed March 23, 1938) appellants should pay appellees interest, costs and 10% damages.

Appellants' Right to Answer.

Appellants in this part of their petition simply reargue what was argued in their main and reply briefs. For reply to their arguments we refer to Appellees' Brief. Appellants refuse to learn by experience. They are still willing to reiterate (p. 11) that an order was

obtained surreptitiously by appellees' counsel, although the record is bare of anything to support their claim except their own unsupported assertion, and although their assertion is so flagrantly improper that this Court in its opinion did not deem it worthy of notice.

Appellants' last paragraph on this point shows their real position. They insistently and loudly complain that they were deprived of their "rights" concerning the $48,580.40 because the court did not permit them to plead to the merits. Appellees' brief showed that appellants were not deprived of any rights and that their claim that they wanted to plead to the merits and were not allowed to do so is a pure subterfuge. This Court has pointed out in its opinion that appellants were directed to plead to the merits as to the $20,000 and did not do so. They now say they did not plead to the merits because they wanted to insist upon the question of jurisdiction. If, as they say, they didn't want to plead to the merits as to the $20,000, then upon what theory did they want to plead to the merits as to the $48,580.40? Of course, they also ignore the fact that the question of jurisdiction had been decided in the previous order of May 27th, from which no appeal was taken.

Appellants Have No Interest in the Fund.

Appellants have no regard for the rule that decisions of courts of appeal are based upon a record, and not upon unsworn and unsupported statements of the lawyer for the appellants. To contradict the statement of this Court that it appears from the record that appellants have no interest in the $48,580.40, appellants, ignoring the record, state at great length "what the answer of appellants would have revealed had appellants been allowed to file it".

They were directed to file an answer to the $20,000 but they refused to answer and disclose their interest in that $20,000. Now for the first time they are willing to reveal it. Had they actually desired to show the trial court that they had an interest in the Escrow Fund they could have presented an answer setting up that interest, and asked leave to file it. Had the Court refused to permit them to file it, the answer nevertheless would have been made a part of the transcript of record and would have been before this Court on this appeal.

As appellants' unsupported assertions concerning the contents of their hypothetical answer have no reference or relevancy to the record before this Court, they are impossible to answer, and they require no answer. However, a few remarks concerning them may be of interest to the Court.

Assuming, for discussion, the truth of everything they claim, their claims themselves show that they have no lien upon or interest in the $48,580.40 of the Escrow Fund. They say that Odell rendered services to some of the appellees under different agreements than the contract of April 9, 1935, and, therefore, he has a lien on the Escrow Fund. Has he? The Court will remember that on the oral argument of this case appellants' counsel, Mr. Rahn, made a similar statement; that thereupon Judge Major asked Mr. Rahn whether any such agreement, other than the contract of April 9th, was in the record; that Mr. Rahn said it was; that Judge Major asked him to locate it in the record; that he was unable to do so; that Judge Major then asked Mr. David whether there was any agreement in the record other than that of April 9th, and Mr. David answered that there was but that such agreement showed just the contrary to what appellants claimed it showed; and Mr. David then read to

the Court that part of appellees' original petition referring to such an agreement, which appears on Tr. 25, Rec. 42.

But, assuming, for discussion, that Odell actually did have other contracts with some of the appellees by which they agreed to pay him reasonable fees for his services, or assuming that he is entitled to recover against some of the appellees on a *quantum meruit*, has he therefore a lien upon or interest in the Sales Tax Escrow Fund? Upon no legal theory has he any such interest or lien. Appellants say in their suggestions in opposition to appellees' petition for costs, interest and damages (p. 2):

> "The appellants were, as escrow officers, trustees of the funds entrusted to their care. Their office was that of a fiduciary; their duties and liabilities were to all of the 368 depositors."

They say on page 10 of their petition for rehearing:

> "This escrow, like other escrows, was established for protection. In this case to protect the State of Illinois pending the outcome of the litigation."

Now, if Odell and Harris are holding, as trustees, a Fund belonging to over 300 contractors, under no legal theory has Odell a lien on or interest in the Fund merely because he has a claim for legal services against some of the owners of that Fund.

Neither by statute nor common law has a lawyer a lien on or interest in a trust of which he is one of the trustees merely because one or some of the beneficiaries of the trust owe him money for legal services. The Illinois Attorneys' Lien Statute merely gives a lien to an attorney on a money judgment or decree obtained by means of legal services performed by the attorney pursuant to contract with his client. There was no money judgment or decree obtained by Odell for any of the appellees. But, even if there had been, Odell is not claim-

ing a lien on or interest in a judgment or decree, but in a trust fund of which he is one of three trustees and of which there are over 300 beneficiaries. His claim is without basis or merit. See

Lewis v. *Canadian Pacific Railway Co., et al.* (C. C. A. 7th Cir. 1930), 39 F. (2d) 834,

which opinion cites numerous cases, including

Cameron v. *Boeger*, 200 Ill. 84,

and

Story v. *Hull*, 143 Ill. 506.

The above would dispose, if the matter were actually before this Court (which it is not) of paragraphs 1 to 4, inclusive, 6 and 7 of appellants' hypothetical answer.

It is worthy of comment that it now appears more clearly than ever that appellants have no appealable interest. The only interest they claim (predicated upon statements not a matter of record) is a claim of Odell's for an alleged lien on the Fund because of legal services rendered; and it is clear that as a matter of law no such lien exists.

Incidentally, Odell says he served notice of attorney's lien. If he did, the appellees never heard of it.

Appellants say that Point 5 of their hypothetical answer would show a definite deception was practiced upon them to procure their signature to the order of May 27th. In other words, appellants, one of whom is a lawyer, signed the order, agreed to it in open Court, drew a check for $242,200 pursuant to the order, and then discovered 10 months later that their signatures had been procured by fraud.

Point 8 of their hypothetical answer, appellants say, would aver that an injunction was issued by Judge Stanton enjoining the distribution of this Fund, and that on

May 12, 1937, a restraining order in this cause was entered preventing the dissolution of the said State Court injunction; that said injunction is in full force and they would be violating it should they now disburse the Fund. If they did make this averment in their hypothetical answer, it would not be true. There is no such injunction in existence. (Appellants mysteriously cite the case in which said injunction was entered without naming it. However, we found the case, and unqualifiedly assert that there is no such injunction now in existence in such case.) Even the record before this Court proves that there is not. If such injunction existed, why, on May 27th, did appellants not bring it to the attention of the Court? Why were appellants willing to, and why did they deliberately, violate it by distributing $242,200 of the Fund? If it existed, why did the parties who obtained the restraining order in this Court consent to the orders here appealed from? If it existed, why have appellants just discovered its existence (although they say they were the persons enjoined) some 10 months late?

Appellants say that in Point 10 of their hypothetical answer they would state facts to show that jurisdiction was not conferred on the District Court by consent of the parties. If there were facts of such nature, then, as we pointed out in our original brief, it was not only the right, but the duty, of appellants to state those facts in their special answers claiming that the court had no jurisdiction. Their special answers averred no facts.

Point 11 of said hypothetical answer would show, say appellants, that "it is believed that the petitions were filed without authority of the alleged appellees and without knowledge of some of them." The "belief" of appellants is hardly sufficient to refute appellees' sworn petition and the authority of appellees' counsel to represent them.

Point 12 of appellants' hypothetical answer would show, they say, that the tax litigation was eminently successful. What would that have to do with the question of the Court's jurisdiction in this case? If it was successful within the meaning of the agreement of April 9, 1937, there is still reserved in the bank $20,000 to be paid upon order of the District Court to those persons entitled to it. And the maximum to be paid under the agreement of April 9th was $20,000.

Successful (???) Contractors' Suit.

Appellees' original petition alleged the facts concerning the contractors' suit, and the consent order of May 27th could not have been agreed to by the parties or entered by the Court if the facts so alleged in appellees' petition had not been conceded to be true by all concerned. *The contractors' suit was decided against the contractors.*

A reading of the opinion in

Blome Co., et al. v. *Ames, et al.*, 365 Ill. 456,

is all that is necessary to determine that fact. But, even if the contractors had won that case, appellants would have had no interest in the $48,580.40 which they refuse to release. Appellants were not to get anything out of the Escrow Fund if the suit was successful. The alleged bankrupt, and it only, was to get $20,000 if the contractors were held to be exempt from the sales tax. $20,000 was reserved by the Court in its order of July 12th, subject to all claims and rights of all persons in and to said $20,000. (Tr. 98, 99) However, it should be noted that the contract concerning the $20,000 shows clearly that the alleged bankrupt was to get the $20,000 "in the event of a favorable ruling after proceedings have been in-

stitutes in the State Court *holding said subscribers (the contractors) exempt from said tax.*" (Tr. 23) The Supreme Court, in the *Blome* case, said:

> "It is the contention of appellants (the contractors) that they do not come within the Act. • • • The *Bradley Supply Co.* case, *supra,* is conclusive as to the point now urged."

In the

Bradley Supply Co. case, 359 Ill. 162,

the Supreme Court had held that *supply dealers* were exempt from the tax and that *contractors* were *not* exempt from the tax.

Yet, appellants go to great length in their petition for rehearing to prove, by statements and assertions totally without basis in the record, that Odell was successful in the contractors' suit. We know of no word to describe appellants' claims about Odell's alleged success except "fantastic."

Pursuant to the agreed order of May 27, 1937, in this case, there was paid to the Illinois Department of Finance out of the Escrow Fund of $314,885.96 (supposed to cover all of the sales taxes of the contractors in the Escrow for the period covered by the Escrow), on account of sales taxes of said contractors, $242,200 or 75% of the total amount plus interest of 3%. Appellants' logic apparently is this: the Tax Service Association was to endeavor, by litigation on behalf of the contractors, to have the Courts declare the contractors *exempt* from the sales tax. The Tax Service Association retained Mr. Odell to handle the litigation. He did so. The contractors deposited $315,000 in escrow to protect the State of Illinois in case the contractors were held subject to the tax. After the suit was decided they paid to the State, *on account,* $242,200 out of the $314,885.96

This proves that the contractors were held to be exempt from the tax and that Mr. Odell was successful in the prosecution of the litigation.

But the balance of appellants' argument is even more fantastic. It runs about as follows: Appellees and Odell and Harris agreed that appellees were in no event liable for a sales tax on the labor appellees furnished. Therefore, appellees put in the Escrow Fund an amount representing the sales tax only on the materials furnished. The suit was instituted to have the appellees held exempt from *any* sales tax. The Supreme Court held that appellees were *not* exempt from the tax and were liable for a tax on the materials they furnished. Therefore appellees were held exempt from the tax, Odell was successful in the lawsuit and appellees gained great sums of money.

Actually, the fact is that the Illinois Retailers' Occupation Tax Act never taxed contractors on their labor. The law taxes gross receipts from the sale of tangible personal property only. The Supreme Court did hold in the *Blome* case that the Director of Finance could not compel the contractors to follow his prescribed method of billing, and that minor point was the only one in the *Blome* case decided favorably to the contractors. Appellants well know that their statement that the Director of Finance required payment of approximately only 75% of the tax on materials, leaving a saving of 25% to the contractors, is not true and that the payment of 75% was a payment on account only.

But we have not yet reached the apex of appellants' fantastic argument. It is as follows: In December, 1937, 10 months after the *Blome* case was decided, the Supreme Court held in the *Herlihy* case that building contractors were not liable for taxes on the materials they

furnished. The appellants had nothing to do with the *Herlihy* case either as parties or attorneys. But, (according to appellants' logic), the Supreme Court of Illinois, having in the *Herlihy* case overruled the *Blome* case which Odell lost for the appellees, this proves that Mr. Odell was successful in his litigation in the *Blome* case and won a substantial victory there for appellees "in procuring their exemption from the Retailers' Occupation Tax Act of the State of Illinois."

Conclusion.

Appellees respectfully submit that appellants' petition for rehearing should be denied. Appellees further submit that the character of appellants' petition for rehearing is confirmation of the fact that appellants' appeal was frivolous and has been pursued solely for the purpose of delay. On March 23, 1938, appellees filed in this cause a petition that the mandate of this Court provide that appellants Odell and Harris pay appellees costs and interest and also damages of 10% because the appeal was frivolous and pursued for the purpose of delay. Appellees respectfully submit that the prayer of their petition should be allowed. It is, therefore, respectfully submitted that the petition for rehearing should be denied, the orders appealed from affirmed, and that the mandate of this Court should provide that appellants and their surety on their supersedeas bond pay to appellees appellees' costs, interest on $48,580.40 from July 12, 1937, and damages of 10% of $48,580.40, in accordance with Rule 26 of this Court.

Respectfully submitted,

SIGMUND W. DAVID,
Attorney for Dahl-Steadman Co., et al., Petitioners-Appellees.

And afterwards, to-wit: On the sixth day of April, 1938, there was filed in the office of the Clerk of this Court, Corrections of Misstatements in Answer to Petition for Rehearing and Suggestions Re; Costs and Damages, which said Corrections are in the words and figures following, to-wit:

No. 6355

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

In the Matter of
Tax Service Association of Illinois,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
Appellants,
vs.
Avery Brundage Company, *et al.*, and Dahl-Stedman Co., *et al.*,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

CORRECTIONS OF MISSTATEMENTS BY APPELLEES IN BOTH THEIR ANSWER TO PETITION FOR REHEARING AND ANSWER TO APPELLEES SUGGESTONS RE INTEREST AND DAMAGES.

To the Honorable Judges of the United States Circuit Court of Appeals:

On page 13 of their printed answer and on page 3 of their typewritten answer appellees have said:

"There is no such injunction in existence."

Appellants stated in their briefs there was such an injunction. Without going into the many misstatements appellees have made, we desire to correct at least this one.

On March 6, 1937, before Judge Walter T. Stanton, the following took place:

"State of Illinois, } ss.
County of Cook. }

IN THE SUPERIOR COURT OF COOK COUNTY.

National Bureau of Property Administration, Inc., a corp.,
vs.
Tax Service Association of Illinois, a corporation. } No. 37 S 1716.

ORDER.

This cause coming on to be heard on the sworn petition of the Receiver, Sylvester O'Donohue and no notice being required by the Court, and the Court having heard testimony and argument of counsel.

It is Ordered, Adjudged and Decreed that R. G. Harris and Benjamin O'Dell deliver to the Receiver Sylvester O'Donohue forthwith, all records, accounts and contracts in connection with certain Sales Tax Exemption cases which the Tax Service Association of Illinois has contracted to service for the following groups, Associations, and corporations:

1. Contractors Sales Tax Fund. * * *

Further that all the said persons and banks be and are hereby restrained from making any transfer, withdrawal or removal of any money in said accounts until further order of court.

March 6, 1937.

Enter:

Walter T. Stanton,
Judge."

It is true, as appellees have said, that the Appellate Court of the State of Illinois, did reverse the decision of Judge Stanton appointing a receiver for the Tax Service Association. However, upon the presentation of the mandate of the Appellate Court to Judge Stanton and application to him to dissolve the injunction and vacate the orders entered therein, there was there and then presented in open court before Judge Stanton an injunction issued May 12, 1937 by Judge Phillip L. Sullivan of the United States District Court restraining appellants from further proceeding in either the

said Superior Court case No. 37 S 1716 or the said Appellate Court case No. 39507. Thus the Superior Court injunction could not be dissolved.

The District Court's injunction is as follows:

"In the District Court of the United States

For the Northern District of Illinois,

Eastern Division.

In the Matter of
Tax Service Association of Illinois, a corporation, Alleged Bankrupt. } No. 65890.

ORDER.

At Chicago, Illinois, this 12th day of May, A. D. 1937.

This cause coming on to be heard upon the motion of National Bureau of Property Administration, Inc., a corporation, one of the petitioning creditors in the above entitled matter, and it appearing to the Court that the alleged bankrupt, Tax Service Association of Illinois, its agents and attorneys, and its officers and directors, Roy C. Harris, George P. Clayson, Mildred P. Voight, Ralph A. Simmons and Clarence Meyer, their agents and attorneys, have been and are now prosecuting or attempting to prosecute certain purported rights, remedies or causes of action which, if they in fact exist, are rightfully vested in and are the property of William L. O'Connell, Jr., the duly appointed and qualified Receiver in this cause, and are about to institute and prosecute other purported rights, remedies or causes of action which, if they in fact exist, are vested in and are the property of the said Receiver herein, and the Court being fully advised in the premises:

It Is Hereby Ordered that the alleged bankrupt, to-wit: Tax Service Association of Illinois, its agents and attorneys, and the officers and directors of the said alleged bankrupt, to-wit: Roy G. Harris, George P. Clayson, Mildred P. Voight, Ralph A. Simmons and Clarence Meyer, their agents and attorneys, be and they are each

of them hereby restrained and enjoined of and from in any manner further proceeding in that certain cause now pending in the Superior Court of Cook County, case No. 37 S 1716, and of and from in any manner further proceeding in that certain cause now pending in the Appellate Court of Illinois, First District, First Division, case No. 39507, and of and from in any manner further appearing in any of the above said causes, and that they and each of them be and they are hereby restrained and enjoined of and from instituting or prosecuting any suit, claim or cause of action of any kind or nature, whether in law or in equity, based upon any subject matter involving or pertaining to, directly or indirectly, Tax Service Association of Illinois, the alleged bankrupt, until the further order of this Court,

Enter:

Philip L. Sullivan,
Judge."

Both of these injunctions are still in full force and effect.

It is true that $242,200.00 of the fund was disbursed to the State of Illinois upon solicitation of Judge Sullivan and on order before him but that order so disbursing it was with the consent and approval of the attorneys who procured the injunction in the Receivership in the Superior Court, from Judge Stanton.

Appellants, therefore, as related in their petition for rehearing, were enjoined from signing the checks.

Respectfully submitted,
Roy C. Harris,
Benjamin F. J. Odell,
By Kenart M. Rahn,
Attorney for Appellants.

Kenart M. Rahn,
Attorney for Appellants.

State of Illinois, }
County of Cook. } ss.

Kenart M. Rahn, being first duly sworn, on oath, says that he is conversant with the above and foregoing "corrections of appellees misstatements", that he knows the contents

thereof and that the matters and things therein stated are true in substance and in fact:

Kenart M. Rahn.

Subscribed and sworn to before me this 6th day of April, 1938.

Ruth V. Willner,
Notary Public.

Endorsed: Filed April 6, 1938. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the eleventh day of April, 1938, the following further proceedings were had and entered of record, to-wit:

Monday, April 11, 1938.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Walter E. Treanor, Circuit Judge.

In the Matter of
Tax Service Association,
Alleged Bankrupt.

Roy G. Harris, *et al.*,
6355 *vs.*
Avery Brundage, *et al*,

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the Petition for a Rehearing of this cause be and the same is hereby denied.

It is further ordered that the costs of this suit be taxed against the appellants.

It is further ordered that appellants pay to the appellees interest on $48,580.40, at the rate of 5% per annum, from July 12, 1937, until said $48,580.40 is paid.

It is further ordered that the petition for allowance of ten per cent damages in addition thereto be and the same is hereby denied.

And afterwards, to-wit: On the fourteenth day of April, 1938, the following further proceedings were had and entered of record, to-wit:

Thursday, April 14, 1938.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.

In the Matter of
Tax Service Association,
Alleged Bankrupt.

Roy G. Harris, *et al.*,
6355 *vs.*
Avery Brundage, *et al.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On motion of counsel for appellants, It is ordered that the Mandate in this cause be and the same is hereby stayed until the further order of this court, and that counsel for appellants promptly file a Petition for a Writ of Certiorari in the Supreme Court of the United States and forthwith file proof of the filing of said Petition in this Court.

And afterwards, to-wit: On the twenty-fifth day of April, 1938, there was filed in the office of the Clerk of this Court, a Notice and Praecipe for Supreme Court Record, which said Notice and Praecipe are in the words and figures following, to-wit:

No. 6355.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of
Tax Service Association of
Illinois,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
Appellants,
vs.
Avery Brundage Company, *et al.*,
and Dahl-Stedman Co., *et al.*,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

NOTICE.

To: Sigmund W. David,
38 S. Dearborn Street
Chicago, Illinois,
Attorney for Appellees,
Dahl-Stedman Company, *et al.*

Please be advised that on or before Monday the 25th day of April, 1938, I shall file with the Clerk of the court a praecipe for a transcript of the record pursuant to a Petition for Certiorari to be shortly filed in the Supreme Court of the United States, in the above entitled cause, a copy of which praecipe is herewith served upon you.

Kenart M. Rahn,
Attorney for Appellants.

Received a copy of above mentioned praecipe this 25th day of April, 1938.

Sigmund W. David,
Attorney for Appellees.

No. 6355.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of
Tax Service Association of Illinois,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
Appellants,
vs.
Avery Brundage Company, *et al.*, and Dahl-Stedman Co., *et al.*,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

PRAECIPE.

To: The Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States pursuant to a Petition for Certiorari which will shortly be filed by appellants Roy G. Harris and Benjamin F. J. Odell with the Clerk of the Supreme Court of the United States, and to include in such transcript of record, the following, to wit:

1. Order reducing supersedeas bond to $7500.00 entered on October 7, 1937.
2. Supersedeas bond of appellants Roy G. Harris and Benjamin F. J. Odell.
3. Order of November 3, 1937 approving supersedeas bond.
4. Opinion of Honorable J. Earl Major, entered on March 9, 1938.
5. Decree of affirmance entered on March 9, 1938.
6. Petition for re-hearing filed March 29, 1938.
7. Order of April 11, 1938 denying re-hearing.
8. Order of April 14, 1938 staying mandate.
9. Notice of filing Praecipe.

10. This praecipe for transcript of record and service thereon.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the Supreme Court of the United States and to be filed in the office of the Clerk of the Supreme Court of the United States, within the time required by law and the rules of said Court.

Kenart M. Rahn,
Attorney for Roy G. Harris and Benjamin F. J. Odell, appellants.

April 25, 1938.

Received a copy of the above this 25th day of April, 1938.

Sigmund W. David,
Attorney for Appellees.

Endorsed: Filed April 25, 1938. Frederick G. Campbell, Clerk.

And afterwards, to wit: On the twenty-sixth day of April, 1938, there was filed in the office of the Clerk of this Court, a Notice and Appellees Praecipe for Supreme Court Record, which said Notice and Praecipe are in the words and figures following, to-wit:

No. 6355

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of
Tax Service Association of Illinois,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
Appellants,
vs.
Avery Brundage Company, *et al.*, and Dahl-Stedman Co., *et al.*,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

NOTICE.

To:
Kenart M. Rahn,
7 S. Dearborn St.,
Chicago, Illinois,
Attorney for Appellants,
Benjamin F. J. Odell and
Roy G. Harris.

Please take notice that on Tuesday, April 26, 1938, I shall file with the Clerk of the United States Circuit Court of Appeals of the Seventh Circuit, a praecipe requesting him to include certain matters in the transcript of the record to be filed in the Supreme Court of the United States, pursuant to a petition for certiorari to be filed by the appellants in the above entitled cause, a copy of which praecipe is herewith served upon you.

Sigmund W. David,
Attorney for Appellees.

Received a copy of the above mentioned notice and praecipe this 26th day of April, 1938.

Kenart M. Rahn,
Attorney for Appellants.
By E. L. George.

No. 6355

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of Tax Service Association of Illinois, Alleged Bankrupt.	
Roy G. Harris and Benjamin F. J. Odell, *Appellants,*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.
vs.	
Avery Brundage Company, *et al.*, and Dahl-Stedman Co., *et al.*, *Appellees.*	

PRAECIPE.

To: The Clerk of the United States Circuit Court of Appeals for the Seventh Circuit:

You are hereby requested to include in the transcript of record you are preparing to be filed in the Supreme Court of the United States, pursuant to a Petition for Certiorari to be filed by appellants Roy G. Harris and Benjamin F. J. Odell, with the Clerk of the Supreme Court of the United States, the following:

1. Petition of Appellees That the Mandate of This Court Provide That Appellants Odell and Harris Pay Appellees Costs, Interest and Damages, filed March 23, 1938.

2. Appellees' Answer to Petition for Rehearing, filed April 5, 1938.

3. This praecipe for additional matters to be included in the transcript of record and service thereof.

Sigmund W. David,
Attorney for Avery Brundage Company, et al., and Dahl-Stedman Co., et al., Appellees.

April 26, 1938.

Received a copy of the above praecipe this 26th day of April, 1938.

Kenart M. Rahn,
Attorney for Appellants.
By E. L. George.

Endorsed: Filed April 26, 1938. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-seventh day of April, 1937, there was filed in the office of the Clerk of this Court, a Notice and Additional Praecipe for Appellants, which said Notice and Praecipe are in the words and figures following, to-wit:

No. 6355

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of
Tax Service Association of Illinois,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
Appellants,
vs.
Avery Brundage Company, *et al.*, and Dahl-Stedman Co., *et al.*,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

NOTICE.

To: Sigmund W. David,
38 S. Dearborn Street,
Chicago, Illinois,
Attorney for Appellees,
Dahl-Stedman Company, *et al.*

Please be advised that on Wednesday the 27th day of April, 1938, I shall file with the Clerk of the court an additional praecipe for additional documents for a transcript of the rec-

ord pursuant to a Petition for Certiorari to be shortly filed in the Supreme Court of the United States, in the above entitled cause, a copy of which praecipe is herewith served upon you.

Kenart M. Rahn,
Attorney for Appellants.

Received a copy of above mentioned praecipe this 27th day of April, 1938.

Sigmund W. David,
Attorney for Appellees.

No. 6355

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of
Tax Service Association of Illinois,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
Appellants,
vs.
Avery Brundage Company, *et al.*, and Dahl-Stedman Co., *et al.*,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

ADDITIONAL PRAECIPE FOR APPELLANTS.

To: The Clerk of the United States Circuit Court of Appeals for the Seventh Circuit:

You are hereby requested to include in the transcript of record you are preparing to be filed in the Supreme Court of the United States, pursuant to a Petition for Certiorari to be filed by appellants Roy G. Harris and Benjamin F. J. Odell, with the Clerk of the Supreme Court of the United States, in addition to instruments heretofore requested, the following:

1. Suggestions in Opposition to Appellees' Petition Re Costs, Interest and Damages Filed March 30, 1938.

2. Corrections of Misstatements by Appellees, in Both Their Answer to Petition for Rehearing and Answer to Appellees' Suggestions Re Interest and Damages, Filed April 6, 1938.

3. This Praecipe for Additional Documents With Service Thereon.

Kenart M. Rahn,
Attorney for Appellants.

April 27, 1938.

Received copy of the above praecipe this 27th day of April, 1938.

Sigmund W. David,
Attorney for Appellees.

Endorsed: Filed April 27, 1938. Frederick G. Campbell, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 125 to 206, inclusive, contain a true copy of the proceedings had and papers filed, made in accordance with the Appellant's Praecipe filed on April 25, 1938, the Appellee's Praecipe filed on April 26, 1938 and the Appellant's Additional Praecipe filed on April 27, 1938, in the following entitled cause:

In the Matter of: Tax Service Association,
Alleged Bankrupt.

Roy G. Harris and Benjamin F. J. Odell,
Appellants,

vs.

Average Brundage Company, *et al.*, and
Dahl-Stedman Co., *et al.*,
Appellees,

No. 6355, October Term, 1937, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 4th day of May, A. D. 1938.

(Seal)

Frederick G. Campbell,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 31, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(6546)